IN THE SUPREME COURT OF MISSOURI

RANDALL D. PETERS,	)	
Individually and as Next Friend	)	
For Constance Marie Peters,	)	
	)	
Respondent,	)	
	)	
v.	)	**SC87559**
	)	
GENERAL MOTORS CORPORATION	)	
	)	
Appellant.	)	

SUBSTITUTE BRIEF OF RESPONDENT

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STATEMENT OF FACTS[1]

General Motors ("GM") begins its "Statement of Facts" with a cleverly worded disclaimer. GM asserts that it sets out facts arising solely from Plaintiffs' evidence or undisputed evidence. This is the first of many, clever misdirections found in GM's brief.

This Court's review is limited to facts that support the verdict. GM failed to provide such a statement of facts. Plaintiffs must therefore burden this Brief with a Statement of Facts that permits this Court to understand accurately the factual basis for the jury's verdict. Where specifically pertinent, additional facts will be set out in Plaintiffs' Argument.

INTRODUCTION

This is a products liability action. Plaintiffs alleged a defective condition in their 1993 Oldsmobile Cutlass that resulted in its "propensity to suddenly unexpectedly and uncontrollably accelerate" when being put to a reasonably anticipated use. (LF2, 4-5). Plaintiff Connie Peters suffered serious injuries when the Cutlass suddenly, unexpectedly

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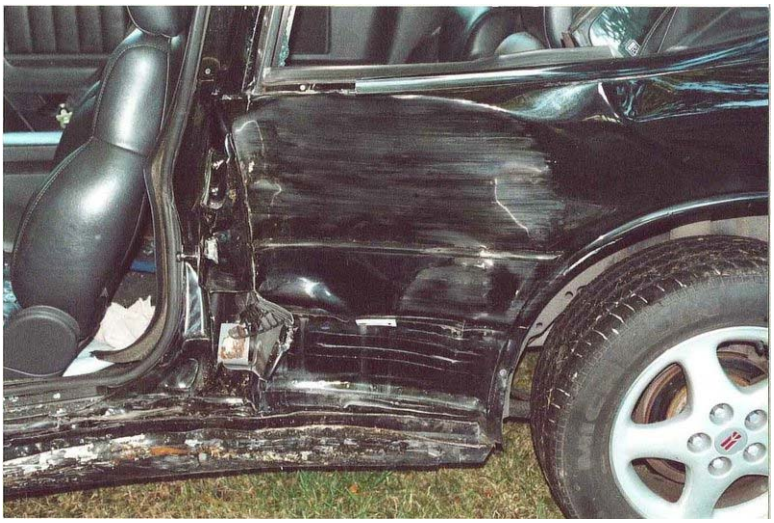
[1] Trial testimony is cited as "T __". Depositions read at trial (but not re-transcribed) are cited as "PEX __, p. __ [Witness]." The Legal File is cited as "LF __." Plaintiffs' and GM's trial exhibits are cited as "PEX __" and "DEX __." References to GM's Substitute Brief are cited as "App.Brief __." References to the Appendix to this Substitute Brief are cited as "App. __."

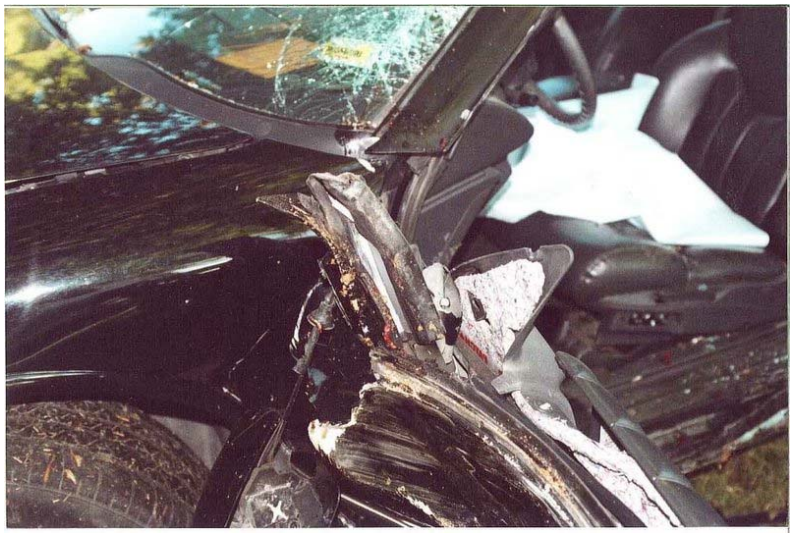
accelerated backwards out of her driveway. (T405-06; PEX147, 7-8 [Webb]; PEX158, 17-18, 21-22 [Blatt]). Plaintiff Randy Peters is Connie's husband. (T819-20). Plaintiffs claimed that the Cutlass suddenly and unexpectedly accelerated due to a malfunction of the cruise control unit. (LF4).

GM made a factual stipulation upon which the court relied in this case. **GM conceded that there are only two possible causes for the sudden acceleration incident in its automobiles: a defective cruise control or pedal misapplication**. (T268, 378, 496, 519, 1178). GM's Brief makes a similar concession.(App.Br.80) ("[O]nly the pedal or cruise control could have opened the throttle in the Oldsmobile."). Pedal misapplication occurs when a driver mistakenly presses the accelerator instead of the brake. (PEX586, 128-29[Sero]). Pedal misapplication is very rare. (T1417).

I. PEDAL ERROR COULD NOT HAVE CAUSED THE ACCIDENT.

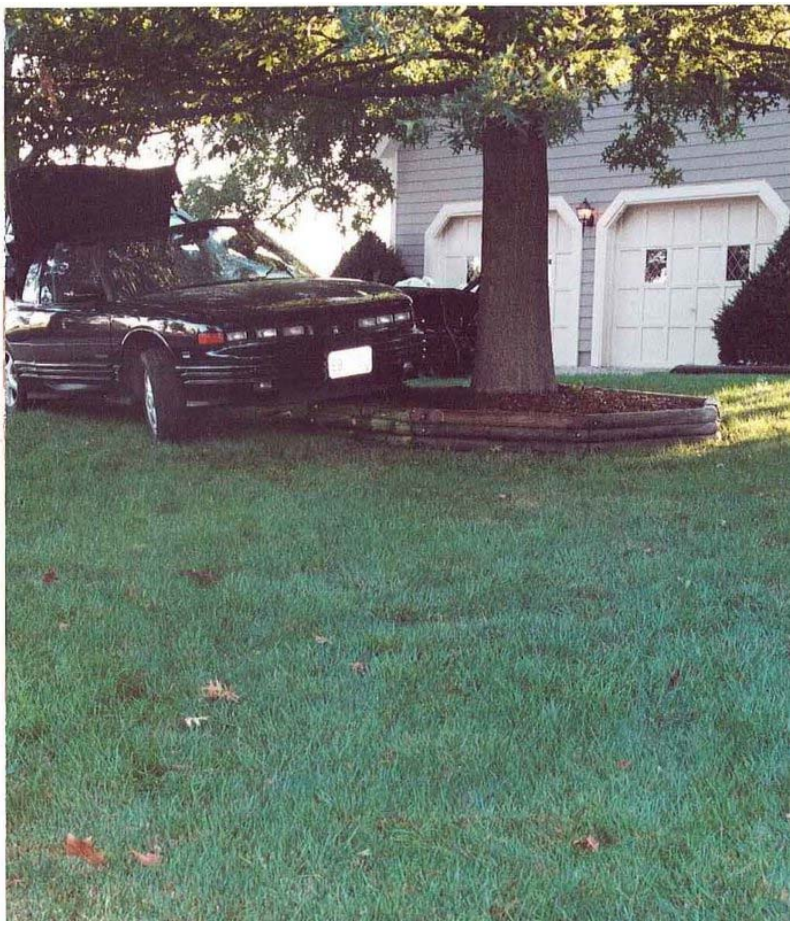
No one witnessed the sudden acceleration incident that resulted in Connie's injuries. Jerry Wallingford, an accident reconstructionist, testified that the Cutlass began in a position of rest, parked near the garage door in the Peters' driveway. (T405-06). The Cutlass accelerated backwards out of the driveway, crossed the street and continued accelerating backwards until it struck a tree in cross-street yard. (T405).



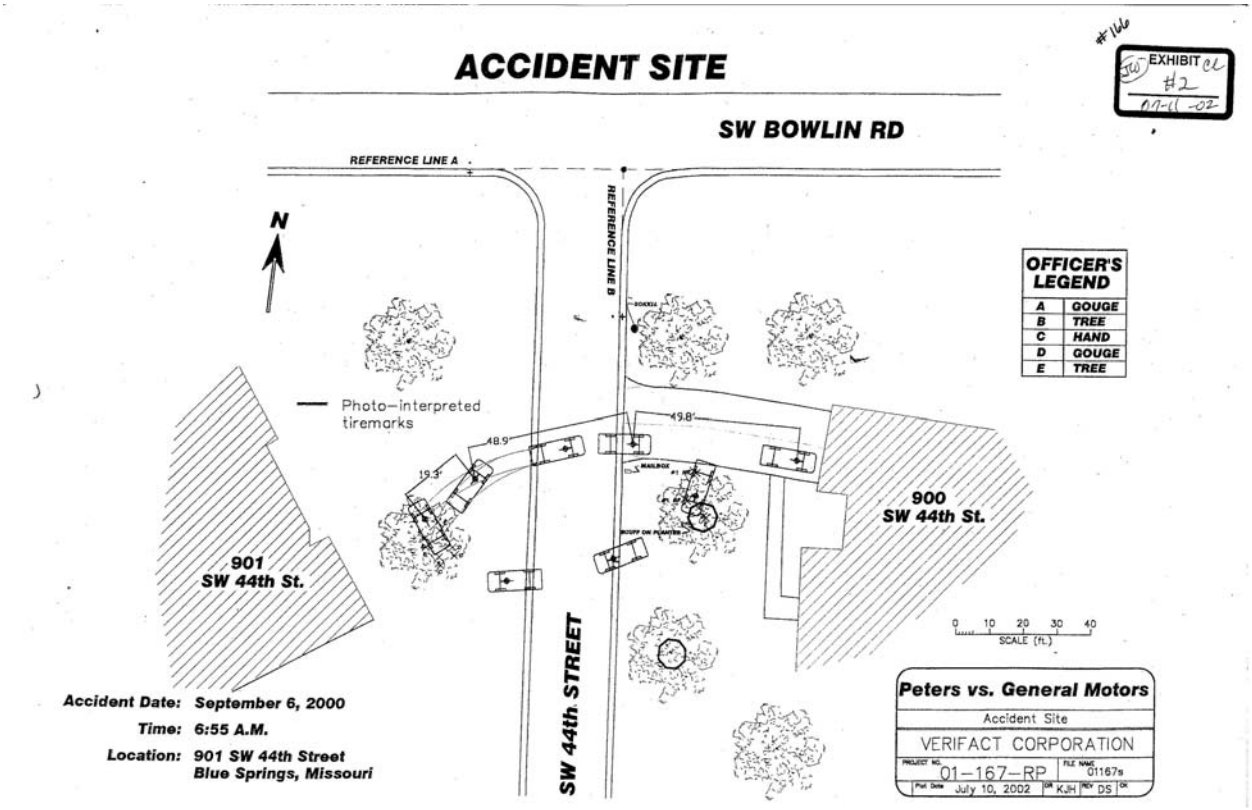


When the Cutlass struck the tree it turned abruptly and accelerated in the opposite direction back across the street, still traveling backwards, into the Peters' yard, where it came to rest on a planter in the Peters' yard. (T405). The Cutlass traveled approximately 118 feet from the Peters' driveway to the tree and approximately 95 feet from the tree, uphill, into and through the Peters' yard, to the planter. (T420-21, 423, 455, 458). The

Cutlass climbed over a planter approximately one foot off the ground. (T409). The Cutlass came to rest with the left front tire stuck inside of the planter. (T405).



Wallingford provided a diagram of the path of the Cutlass that was admitted into evidence. (PEX166).



The tree significantly reduced the speed of the Cutlass. (T411). It almost came to a stop (T420-21); its speed went from 22-25 mph before hitting the tree (T425-28) to 5mph after striking the tree. (T508).

That collision-induced speed reduction made it impossible for the Cutlass to turn around, travel 95 feet back across the street and jump the planter in the Peters' yard under without continued acceleration. (T420-21). Absent additional acceleration after leaving the tree, the Cutlass would have traveled to an entirely different location. (T421-22). The physical evidence showed that the left front tire continued to spin for some period

after the Cutlass came to rest in the planter. (T435-36). The continued spinning of the left front tire indicated that the Cutlass, a front wheel drive vehicle, continued to attempt to accelerate for some period of time after it came to rest in the planter. (T436-37). The Cutlass had to have been under acceleration for the vehicle to have traveled across the street, up the slope and into the planter. (T455).

Wallingford concluded that both left tires of the Cutlass had traveled over the planter. (T432). He testified the final resting position of the Cutlass showed that both left tires went over the landscape timbers. It would be physically and scientifically impossible for the Cutlass to have come to rest in its final position unless both left tires had gone over the landscape timbers of the planter. (T448).

Wallingford's conclusion that pedal error could not have caused this acceleration was based upon physical evidence. (T420-22, 435-37, 455). More energy is necessary for both left tires to go over the timbers than for merely the front left tire to go over the timbers. The energy required for both left tires to climb the landscape timbers showed that the Cutlass continued to accelerate after it left the tree. (T451-52). The Cutlass could not have jumped the planter with both left tires if it was merely traveling under idle speed after it left the tree. (T511).

The testimony of Dr. Geoffrey Blatt supported Wallingford's conclusion that the Cutlass continued to accelerate after hitting the tree and that Mrs. Peters could not have depressed the accelerator after she lost consciousness. (T457-58). Dr. Blatt, a neurosurgeon, testified to a reasonable degree of medical certainty that Mrs. Peters lost

consciousness when she struck the tree in the neighbor's yard and would not have been able voluntarily to step on the gas pedal. (PEX158, 3 [Blatt]). This conclusion was further supported by the testimony of GM's human factors expert, Dr. Young, who opined that Mrs. Peters' foot would have come off of the accelerator when she struck the tree. (T1414). Dr. Young acknowledged that any continued acceleration after the Cutlass hit the tree would indicate that this incident did not result from pedal misapplication. (T1413-14).

GM's theory was that the Cutlass traveled 95 feet, across the street, over curbs on either side of the street, up hill, climbing a planter that was approximately one foot off of the ground – and the Cutlass did all of this with no acceleration. (T405, 409, 420-21, 423, 455, 458, 1253-54). GM presented this theory through the testimony of its accident reconstruction expert, Charles Moffatt.

Moffatt agreed with Wallingford that the Cutlass had to accelerate significantly before it reached the tree. (T1241). Moffatt also agreed that the Cutlass followed the path described by Wallingford. (T1253-54). However, Moffatt disagreed with Wallingford's conclusion that two tires of the Cutlass climbed over the planter. Moffatt concluded that only one tire of the Cutlass climbed over the planter. (T1726). Based upon the assumption that only one tire climbed over the planter, Moffatt concluded that the Cutlass could have traversed the path between the tree and the planter, including all of the obstacles in between, with no acceleration and purely by its own momentum. (T1242, 1276). The jury rejected GM's theory.

II. GM'S KNOWLEDGE REGARDING SUDDEN ACCELERATION INCIDENTS.

The Peters' vehicle had a three-mode cruise control that consists of a microprocessor, a "servo," which is a rubber diaphragm with two solenoid operated valves that pulls on or relaxes the throttle cable, and operator input switches. (PEX586, 21-22 [Sero]). The microprocessor, or circuit board, takes driver input from the cruise control buttons on the steering column and distributes that information to transistors that control the servo. (Id.24-25).

The evidence established that GM had long been aware of the problems associated with the three-mode cruise control. Marshall Meads, Chester Rozanski and Daniel Crawford, all GM employees, provided testimony regarding the history of cruise control design at GM and its subsidiaries. Plaintiffs also presented numerous documents that established GM's knowledge regarding the propensity of the three-mode cruise control to cause sudden acceleration incidents.

A. Marshall Meads.

Marshall Meads, worked as an engineer at GM for more than 36 years before retiring in 1995; Meads testified for Plaintiffs. (PEX572, 4-5, 7 [Meads]). From 1992 to 1995 Meads headed the Cruise Control Center of Expertise ("Cruise Control COE"); the

Cruise Control COE answered any questions within GM pertaining to cruise controls. (Id.7). He had worked with cruise controls since the early 1980s. (Id.7).

In 1992, Meads participated in making a Corporate Product Performance Objective ("CPPO") proposal to the Powertrain Committee at the GM Technical Center regarding cruise controls. (Id.8-9). The CPPO indicated that "[t]he Cruise Control COE felt an immediate need to document accountability for cruise control security guidelines." (Id.10). Meads testified that the phrase "cruise control security" referred to an effort to be sure that the cruise control did not function in any undesired manner. (Id.10-11). The CPPO arose from a concern that had developed approximately one year earlier, that "security features that we felt were very necessary in a cruise control system were . . . being overlooked." (Id.11-12). The CPPO was intended to address security features that "ought to be common to any cruise control." (Id.12).

Meads was familiar with a document entitled Cruise Control System Design Security Objectives ("Design Objectives"). It discussed the same security issues that were the subject of the CPPO. (Id.12, 17). The Design Objectives were first set forth by the Cruise Control COE on November 14, 1989. (Id.23). One of the objectives stated in the Design Objectives was that "[n]o single point system fault shall cause a throttle advance." (Id. 15). A single-point system fault would include electrical faults. (Id. 15).

Meads' testified that his group had duplicated sudden acceleration incidents in their testing:

> **At our Center of Expertise meetings, we could hot wire and duplicate some of these failures, that is being one of them, at very low speed that shift into gear and just actuate the cruise and we made sure that everybody that was in the release group engineering activity that had anything to do with cruise experienced what it would be like[] to be sitting in a parking lot and drop this thing into gear and just have the cruise take off on you.**

(Id.16). As to sudden acceleration incidents, Meads said:

> **[I]t was an experience that this is something that we didn't want to happen to us. We sure didn't want it to happen to our young teenage drivers and it's absolutely unacceptable to have my 60-, 70-year-old father experience this thing or an older person and it was just unacceptable behavior for any of us that had children or anything like that to live with. We just weren't going to tolerate it.**

(Id.16).

A single electrical fault could actuate the throttle on a three-mode cruise control system, whereas the alternative design stepper-motor cruise control system could not be actuated by a single electrical fault. (Id.24-25). This was one of the reasons that he and Cruise Control COE had recommended switching from a three-mode cruise system to a stepper-motor system. (Id.24-25). System security was one of the reasons that GM eventually switched from the three-mode system to the stepper-motor system. (Id.26-27).

At a meeting with the Powertrain Subcommittee on February 20, 1992, Meads recommended the adoption of the cruise security objectives set forth in the CPPO. (Id.18). After the meeting with the Powertrain Subcommittee, Meads attended a second meeting with the Electrical Subcommittee at which he also recommended adoption of the security objectives. (Id.25). However, Meads received a great deal of resistance from the Electrical Subcommittee regarding adoption of the security objectives and, as a result of that resistance, the security objectives recommended in the CPPO were eventually abandoned. (Id.25-26). Meads' managers informed him that the Electrical Subcommittee had "enough horsepower to kill us wherever we go" and that the Cruise Control COE was "just going to be wasting [its] time and effort" trying to get the CPPO adopted. (Id.26). "[T]hey did a hatchet job on us." (Id.26). GM never adopted the security objectives Meads recommended. (Id. 18, 25).

B. Chester Rozanski.

Chester Rozanski, an engineering group manager at GM for cruise control systems, testified for Plaintiffs. (PEX574, 6-7 [Rozanski]). Rozanski gave a presentation at a meeting on December 20, 1990, in which he made specific proposals for changes to cruise control systems. (Id.5, 7-8). At that meeting, he addressed the concern that a single fault could actuate the throttle in a three-mode cruise control. (Id.12-14). He also pointed out that a single fault could not advance the throttle with the stepper-motor system. (Id.15). There was also a security upgrade to the three-mode system that would

prevent a single fault from actuating the throttle. (Id. 5). Rozanski recommended that GM switch to the stepper-motor system. (Id.16).

At the time of the December 1990 meeting, Rozanski was participating in the Cruise Control COE and was involved in the COE recommendation that "cruise control systems be subject to new security guidelines." (Id.8-9). He was also involved in the proposal to adopt the CPPO pertaining to cruise control security issues. (Id.9). At the same time that the cruise control safety CPPO was being proposed within GM, he was involved in proposing that GM switch from the three-mode cruise control system to the stepper-motor system. (Id.10-11, 18). The stepper-motor cruise control system met the minimum security standards in the CPPO that was proposed by the Cruise Control COE. (Id.11). The three-mode cruise control system did not meet the minimum security standards in the proposed CPPO. (Id.18).

At a second meeting on January 17, 1991, Rozanski gave a presentation to the Powertrain Subcommittee. (Id.18-19). Rozanski again requested approval of the CPPO proposed by the Cruise Control COE. (Id.19-20). He also proposed that GM switch from the three-mode cruise control system to the stepper-motor system. (Id.20-21). He addressed security issues pertaining to the potential for a single fault to actuate the throttle. (Id.21).

At the time that Rozanski made his recommendations, GM was already using the stepper-motor system in some vehicles and had been doing so since 1988. (Id.24). GM did not begin using the stepper-motor system on the "W" car until 1994. (Id.28).

C. Documents that establish GM's knowledge.

A summary of documents that establish GM's knowledge regarding the propensity of the three-mode cruise control to cause sudden acceleration incidents is included in the record (LF3119) and Appendix 19-24. Of particular note is a 1988 document entitled "Unwanted Acceleration: A Challenge To The Automotive System Engineer." (PEX 748). This document identifies transients as a "known factor" associated with "unwanted acceleration" in a "cruise control." (Id.308075).

D. Admissions of Daniel Crawford.

Daniel Crawford, a former employee of a GM subsidiary, testified as GM's expert on the design of cruise control systems. (T892-95). Crawford designed the first three-mode cruise control system that went into GM trucks in 1983. (T905-06). The three-mode system was available on GM cars from 1984 through 1996. (T917). Crawford's company developed a stepper-motor cruise control system that was introduced on GM trucks in 1988 (T918) and in cars in 1992. (T920). The stepper-motor system was used in the "W" car (the Cutlass) beginning in 1994. (T921). Mrs. Peters' vehicle was manufactured in 1993. (T1063).

Crawford testified that the battery in a car generally provides a 13.8 volt power supply. However, certain electrical devices in a car can introduce "noise" into the power supply which may result in transient spikes of up to a hundred volts. (T989-90). In fact, transients associated with air conditioner compressors can create spikes of 125, 250 or

even 450 volts. (T998-99). Crawford and his employer have been aware of the problem of transient signals and the need to protect against them since the advent of electronic devices on cars in the late 1970s. (T991). Any electrical component in a vehicle can create transient signals; by the late 1970s and early 1980s the automotive engineering industry knew this was important. (T993-94). These transient spikes are a characteristic of all cars. (T990-91). Cruise control system designs are tested for the effects of transients. (T989). Without the use of resistors, capacitors and diodes to protect the cruise module, transient signals can cause unwanted accelerations. (T1120).

Crawford knew of a study performed by Hughes Aircraft regarding potential electrical faults in cruise control systems. (T1012). Hughes Aircraft recognized the potential for a single electrical fault in the three-mode cruise system in 1988. (T1061-62). After being made aware of the potential for a single electrical fault in the three-mode cruise control system in 1988 as a result of the Hughes Aircraft study, Crawford determined that the appropriate course of action was to "essentially redesign the module." (T1064). However, the modifications made to the cruise control system to address the potential for a single electrical fault were not implemented until 1994. (T1062-63). Crawford recognized the problem of the potential for a single electrical fault in the 1989 model year, but believed that the potential for this fault was very low. (T1065).

With regard to incidents that GM had investigated in which a driver complained of unwanted sudden acceleration but GM had found no physical evidence of a defect that

would cause the acceleration, Crawford testified that it was his opinion that those incidents were always the result of pedal error. (T1086, 1090, 1096).

III. ADDITIONAL EVIDENCE OF PRODUCT DEFECT.

Sam Sero, an electrical engineer, testified for Plaintiffs. He explained how the defect in the Cutlass could have occurred. Seven witnesses who had experienced sudden acceleration incidents in "W" cars that were not the result of pedal misapplication also testified.

A. Sam Sero.

Sero has investigated the involvement of cruise controls in sudden acceleration incidents for twelve years. (PEX586, 7 [Sero]). Sero's testimony involved generally accepted electrical engineering principles. (Id.11). Sero investigated the Peters' vehicle and the cruise control on the Peters' vehicle. (Id.13-15).

Sero testified that there are concerns about placing a circuit board, such as the board used in the three-mode cruise control, into the electrical environment in a vehicle which involves a number of other electrical components. (Id.25-26). Sero testified that the electrical engineering community has long been concerned about the effect that different electrical components have on each other. (Id.27).

Sero performed testing on the Peters vehicle that allowed him to confirm what Meads and Rozanski had also confirmed: that a single fault can actuate the throttle on the cruise control in the Cutlass. (Id. 44, 83). Sero used a portable

oscilloscope, a device that can trace electrical patterns on a television screen, to measure the current flows from the wires coming off of the cruise control module in the Peters' vehicle. (Id.46-47). Sero took these measurements with the cruise control in the off position. (Id.49-50). When the cruise control is in the off position no voltage should be supplied to the cruise control so there should be no current flow. (Id.50-51). When Sero tested the Peters' cruise control in the off position, he found that all of the wires coming off of the cruise control had current flow. (Id.51). His testing showed that there were momentary spikes in this current flow. (Id.52). This showed that some other component in the vehicle was creating a sporadic spiking effect that was being picked up by the cruise control. (Id.53).

The stray signals that would come into the circuit board are what Sero refers to as "transient signals." (Id.73-74). In this case, Sero testified that a transient signal was being generated by a component in the Peters' vehicle that was being carried into the cruise control and was capable of firing the outputs that activate the throttle. (Id.74).

Had the circuit board in the Peters' vehicle used resistors in the proper locations, the malfunction of the cruise control could not have occurred. (Id.78). Although the circuit board in the Peters' vehicle included a resistor array, this was not the same as standard carbon resistors and was not sufficient to prevent the malfunction of the cruise control. (Id.78-79). The resistor arrays offered insufficient protection because resistor arrays are simply integrated circuit chips and are susceptible to the same transient signal problems as other circuit chips. (Id.78-79). Carbon resistors have a much higher

capacity for carrying current and are not susceptible to surges in the same way that a resistor array is. (Id.79).

Sero testified that the design of the stepper-motor cruise control system prevented single-point faults of the type that could occur in the three-mode cruise control. (Id.84-86). The potential for a fault in a stepper-motor cruise control to cause a sudden acceleration incident was much lower than with a three-mode cruise control. (Id.86). For these reasons, the stepper-motor system is far safer than the three-mode system. (Id.176).

B. Witnesses Who Experienced Sudden Acceleration Incidents.

Plaintiffs presented the testimony of seven witnesses who had experienced sudden acceleration incidents in "W" cars that were not the result of pedal misapplication. The testimony of these witnesses is discussed in Point III of this Brief.

IV. GM'S NOTICE OF SUDDEN ACCELERATION INCIDENTS.

GM uses a form 1241 report ("1241") to record customer vehicle complaints. (T363). A number of 1241s were admitted into evidence at trial only for the purpose of establishing that GM had notice of sudden acceleration incidents occurring in the "W" car.

A. GM's Failure to Produce 1241s and the Court's Sanction Order.

A discussion of this evidence is provided in Point III, *infra*.

B. Admission Of 1241 Reports.

Plaintiffs provided an independent foundation (aside from the sanction order) for the 1241s through the testimony of Wallingford.

After holding a hearing outside the jury's presence, the trial court held that Plaintiffs were entitled to admit a number of 1241s into evidence on the issue of notice. (T363-93). GM argued during the course of this hearing that the 1241s could not be admitted for purposes of notice because **some** of the 1241s involved incidents in which it was not clear whether or not the vehicle was equipped with a cruise control. (T373-74). **Plaintiffs' counsel explained that this made no difference because the 1241s were being offered to establish notice of sudden acceleration incidents, not notice of defective cruise controls**. (T373-74). Plaintiffs' counsel further pointed out that, for purposes of this case, the parties had agreed that sudden acceleration incidents are the result of either pedal misapplication or cruise control malfunction. (T377). **In the course of arguing the admission of the 1241s, GM agreed that there were only two possible causes for the sudden acceleration incidents described in the 1241s.** (T378).

When GM questioned Wallingford about the percentage of GM vehicles that are equipped with cruise controls, Wallingford testified that it was his understanding that **virtually all GM vehicles are equipped with cruise control.** (T392). Wallingford specifically rejected GM's suggestion that only eighty percent of GM vehicles are equipped with cruise control. (T392).[2]

[2] GM's brief asserts that Wallingford admitted that 80% of W cars were equipped with cruise control. Wallingford specifically rejected GM's 80% figure. (T392, 484)

Plaintiffs introduced the 1241s to the jury in conjunction with the testimony of Wallingford. (T474). Wallingford testified that he had examined the 1241s according to specific criteria with the purpose of determining whether the 1241s addressed incidents that were substantially similar to the sudden acceleration incident involved in this case. (T474-77). Wallingford indicated that he had specifically focused on three criteria:

(1) did the vehicle accelerate without driver input,

(2) was the vehicle initially stopped, and

(3) were any vehicle problems identified as causal factors.

(T475-76). Wallingford testified that the 1241s that he identified met the specified criteria. (T476-77).

In conjunction with the presentation of this evidence, the trial court gave the following limiting instruction:

> Customer complaints of sudden acceleration made to GM and documented on Forms 1241s are being introduced and should be considered by you only as to notice to GM regarding these complaints. They should not be considered by you as evidence of any defect in the vehicle in question in this case.

GM's statements fail to inform the Court that Wallingford was merely referencing the figure that GM had proposed. Wallingford's own testimony remains that "virtually all" of the OSI vehicles had cruise control.

(T478-79).

Pursuant to the parties' agreement, the 1241s were offered into evidence by exhibit number but were not presented individually to the jury. (T370-72, 473).

V. EVIDENCE REGARDING DAMAGES.

Mrs. Peters died on March 3, 2004. Mrs. Peters was alive at the time of trial and the evidence presented to the jury on the issue of damages was presented in that context. That evidence is described below from the perspective of the time prior to Mrs. Peters' death, as it was presented to the jury.

Mrs. Peters was in a very critical condition when she was first admitted to the hospital following the accident. (PEX147, 7 [Webb]). Her left arm had been amputated at the mid-forearm and she was in a coma. (Id.7-8).

Dr. John Webb, her attending physician, asked Dr. Blatt to consult regarding the neurological aspects of Mrs. Peters' treatment. (PEX158, 7 [Blatt]). Blatt testified that Mrs. Peters suffered life threatening injuries including a number of fractures to her skull and hemorrhaging in her brain. (Id.17-18, 21-22). Blatt operated on Mrs. Peters to relieve pressure from her brain. (Id.22-23, 25).

The jury learned that: Mrs. Peters currently resides in a long-term care facility where she receives intensive nursing care. (T575-76). Mrs. Peters receives all of her nutrition through a nasogastric tube; she is permanently catheterized and has no urinary control; she has a tracheostomy tube that allows her to breathe. (T769-70). Mrs. Peters is constantly monitored for infections and has suffered many infections during her time at

the long-term care facility including respiratory tract infections, urinary tract infections and fungal infections on her skin. (T769). Mrs. Peters does not respond to stimuli. (T772).

Dr. Terry Winkler, a life care planner, testified that Mrs. Peters is essentially in a persistent vegetative state and is wholly uncommunicative. (T571-72). The risks associated with this condition include loss of strength, loss of range of motion, skin breakdown and infections. (T571-72). Mrs. Peters' medical bills prior to trial were for care that was reasonable and necessary as a result of her condition and totaled $1,229,993.99 for two years' treatment. (T580-81). Mrs. Peters' life expectancy is between 10 and 15 years. (T585).

Dr. Winkler prepared a life care plan that covered care that he believed, to a reasonable degree of medical certainty, was necessary for Mrs. Peters. (T592). His life care plan estimated the cost of in-home care for a 10- or 15-year period. (T607-08). He estimated the cost in today's dollars for a 10-year life care plan for Mrs. Peters at $4,016,980.91 and the cost in today's dollars for a 15-year life care plan for Mrs. Peters at $6,014,961.59. (T609).

Dr. Bernard Pettingill is an economist who specializes in health economics. (T777-78). Pettingill reviewed Mrs. Peters' financial information and Dr. Winkler's life care plan. (T782-83). He based his opinions upon a 10-year and 15-year life expectancy. (T783). Dr. Pettingill estimated lost wages and benefits (lost earning capacity), for the period of Mrs. Peters' working life expectancy, at approximately $412,000. (T791). He

estimated the present value of medical expenses, based upon Dr. Winkler's reports, at $4,708,969 for 10 years of home care, $3,273,971 for 10 years of residential care, $6,718,245 for 15 years of home care, and $4,708,077 for 15 years of residential care. (T798-99). He estimated the present value of her total economic damages at $6,351,043 for 10 years of home care, $4,916,045 for 10 years of residential care, $8,360,319 for 15 years of home care, and $6,350,151 for 15 years of residential care. (T800-01).

In describing his personal loss, Randy Peters testified that he had been married to Connie Peters for over twenty years and that they had one son, Eric Peters. (T820). Randy's average day now consists of going to work, coming home, taking care of the family dogs, and then going to spend the evening with his wife at the care center. (T838). He sees Mrs. Peters every day and has done so since the accident. (T838). If he had the means, it would be his preference to keep Mrs. Peters at home because he thinks she would like that, he thinks she would receive better care and he would have her close to him. (T838). Peters summed up his loss by saying "I lost my partner, my lover, my companion, my best friend." (T842).

Eric Peters described his mother, before the accident, as being a vibrant, wonderful woman with lots of friends who enjoyed life and loved her husband and son. (T817). He testified that his father had been subject to depression since his mother sustained her injuries. (T818). He indicated that his mother's injuries had been devastating to him and his father. (T817).

SUMMARY OF ARGUMENT

GM's argument assumes, incorrectly, that the testimony of Sam Sero is necessary to Plaintiffs making a submissible case. Any discussion of submissibility based on Sero completely ignores GM's failure to object to Sero's testimony because:

Missouri law allows circumstantial evidence to show a defective condition when a malfunction occurs and other reasonable causes of the malfunction are eliminated. There is no requirement that a plaintiff identify the specific defect or provide expert testimony concerning the defect. GM stipulated that sudden acceleration incidents can have only two causes: pedal error and the cruise control. If pedal error and any other mechanical cause are eliminated, sudden acceleration can only occur as a result of a defective condition in a cruise control. GM's minted-fresh-for-appeal argument that there are many other causes for sudden acceleration such as foreign bodies in the cruise control is incorrect for two reasons. It is factually incorrect because no one found any contamination of the Peters cruise control. It is also contrary to GM's theory of the case that the cruise control had nothing to do with Mrs. Peters' sudden acceleration incident. GM argued pedal error alone as the cause and that Mrs. Peters she was pressing the accelerator believing it was the brake.

Sero's testimony was not offered to show the specific defect, only to explain to the jury how GM's own engineers' internal memoranda showing cruise control error caused by transient electrical signals could actuate the cruise control.

The trial court admitted other similar incident evidence for notice for two reasons: First, as a discovery sanction and second, because the incidents met the standard of similarity for the issue of GM's knowledge of non-pedal-error sudden acceleration issues with its cars. Newman v. Ford Motor Co., 975 S.W.2d 147 (Mo. banc 1998), affirmed the admission of similar incident evidence involving cars made by different manufacturers and different body styles (SUV, minivan, sedan) on the issue of whether a seat-belted passenger could ramp out of a seat when struck from behind. In addition to its sanction rationale for the admission of this evidence, the trial court followed Newman before admitting the evidence.

The Court of Appeals decision ignored the trial court's sanction; further it concluded that GM's only-two-cause stipulation applied only to the Peters vehicle. At trial GM made the stipulation in response to arguments about the admission of others similar incidents. Thus, the stipulation could not have been limited to the Peters vehicle. The Court of Appeals' misstatement of the record is the reason appellate courts apply an abuse of discretion standard to review of a trial court's evidentiary decisions.

The defect similar incident evidence met the standards adopted in Missouri. The Court of Appeals based its dissimilarity conclusion on the application of the brake pedal by some of the defect OSI witnesses, and testimony that Mrs. Peters could not have applied the brake. The defective condition here is the propensity of the cruise control suddenly to accelerate the car, not the failure of the brake pedal to terminate cruise control actuation. The brake pedal issue does not defeat the substantial similarity

necessary to show a defective condition in the cruise control to create sudden acceleration incidents.

The trial court's decision not to allow GM's expert to testify about an admittedly new opinion, never offered before was a proper exercise of discretion. To conclude that experts may change their opinions without notice to opposing parties is to make the discovery process a waste of time. This is particularly so when nothing about the Plaintiffs' evidence or the opinions of its experts changed during the trial.

The jury properly assessed damages in this case. Moreover, GM's internal documents showing that its engineers were aware of the problems in its three-mode cruise control, had developed and had begun using a safer cruise control in other vehicles and knew that "it's absolutely unacceptable to have my 60-70-year-old father experience this thing or an older person and it was just unacceptable behavior for any of us that had children or anything like that to live with" provides the necessary clear and convincing predicate for an award of punitive damages under Missouri law.

The judgment should be affirmed.

ARGUMENT

I. SUBMISSIBILITY

On submissibility review, the court views "the evidence in the light most favorable to the result reached by the jury, giving the plaintiff the benefit of all reasonable inferences and disregarding evidence and inferences which conflict with that verdict." Brenneke v. Department of Missouri, VFW, 984 S.W.2d 134, 137 (Mo. App. 1998). The Court should "disregard the defendant's evidence except as it may aid the plaintiff's case." Benoit v. Missouri Highway and Transportation Comm'n, 33 S.W.3d 663, 667 (Mo. App. 2000). "A motion for JNOV should only be granted when all the evidence and reasonable inferences to be drawn therefrom are so strong against the prevailing party that there is no room for reasonable minds to differ." Missouri Highway Transportation Comm'n v. Kansas City Cold Storage, Inc., 948 S.W.2d 679, 685 (Mo. App. 1997).

A. GM Has Abandoned Its Argument That The Trial Court Erred In Submitting Plaintiffs' Failure To Warn Claim To The Jury.

In its brief in the Western District, GM argued that the trial court erred in submitting Plaintiffs' failure to warn claim to the jury. In its first Point Relied On in its substitute brief, GM still includes language referencing Plaintiffs' failure to warn claim. However, GM's substitute brief does not include any argument whatsoever regarding

Plaintiffs' failure to warn claim. Thus, GM has abandoned its argument that the trial court erred in submitting Plaintiffs' failure to warn claim to the jury.

B. Plaintiffs Presented Substantial Evidence To Establish Their Claims Of Strict Liability And Negligence.

GM admitted that there are only two potential causes for the sudden acceleration of Mrs. Peters' car: pedal misapplication or malfunction in the cruise control. (T268,378,496,519,1178)(App.Br.80)("only the pedal or cruise control could have opened the throttle in the Oldsmobile"). Plaintiffs presented substantial evidence to eliminate pedal misapplication.

Two witnesses established that the Cutlass continued to accelerate after Mrs. Peters was incapable of pressing the accelerator pedal. First, Dr. Blatt testified that Mrs. Peters lost consciousness when the Cutlass struck the tree in the neighbor's yard and, as a result of her injuries, would not have been able to press the accelerator after the Cutlass struck the tree. (PEX158, 46, 49[Blatt]). GM acknowledges that Mrs. Peters was unconscious after the Cutlass left the tree. (App.Br.24).

Second, Plaintiffs' accident reconstruction expert, Wallingford, testified that the Cutlass continued to accelerate after it struck the tree and continued back across the street into the Peters' front yard planter. (T421-22,435-37,451-52,455).

These facts necessarily rule out pedal misapplication as the cause of the accident because acceleration occurred after Mrs. Peters lost consciousness and could not have

pressed the pedal. These two facts provided a wholly sufficient basis for the jury to conclude that a defective condition existed in the Cutlass.

GM argues, based solely upon its mischaracterization of Sam Sero's testimony, that Plaintiffs did not make a submissible case. In doing so, GM casts Sero's testimony in a light most favorable to GM, contrary to the applicable standard of review. By taking portions of Sero's cross-exam, and mischaracterizing it as Plaintiffs' entire proof of defect, GM constructs a straw man which it then attempts to assail. However, GM's mischaracterization of Sero's testimony misses the point. Although Sero testified that his testing on the Peters' vehicle confirmed the concerns of GM's own engineers regarding the defective nature of the three-mode cruise control, Plaintiffs did not rely solely upon that testimony. Plaintiffs made a submissible case on all of their theories independent of Sero's testimony. As noted, the defective condition of the Cutlass can be inferred from the evidence that it continued to accelerate after Mrs. Peters could not physically have pressed the accelerator.

GM's attempt to view all of the other evidence through the lens of Sero's testimony is also misleading. In particular, GM is mistaken in its assertion that Wallingford's testimony depends upon the validity of Sero's mechanism of defect. Wallingford relied upon Sero's testimony regarding how many RPMs the engine would run at if the cruise control was activated. However, Wallingford did not rely upon Sero's testimony regarding **how** the cruise control was activated. Thus, Wallingford's testimony does not rely upon the validity of Sero's mechanism of defect.

GM's brief acknowledges that the existence of a defect may be inferred from circumstantial evidence. (App.Br.63). GM fails to apply this legal principle, arguing that Missouri law requires direct proof of the specific cause of the accident. Although it is the only argument GM can make given the evidence, the argument is incorrect as a matter of law.

Since the adoption of Restatement (Second) Torts §402A, Missouri law has permitted circumstantial evidence to prove a disputed proposition of fact so long as it does not amount to speculation or guesswork. Keener v. Dayton Electric Manufacturing Co., 445 S.W.2d 362, 366 (Mo. 1969). "Absolute certainty of causation is not required in a product liability case and 'probative facts' established by circumstantial evidence and pointing to the desired conclusion with enough certainty to be reasonable and probable is sufficient." Bass v. General Motors Corp.,150 F.3d 842, 850 (8th Cir. 1998); see also Klein v. General Elec. Co., 714 S.W.2d 896, 900 (Mo. App. 1986).

As Uder v. Missouri Farmers Association, Inc., 668 S.W.2d 82, 93 (Mo. App. 1984) explained, "[c]ommon experience tells us that some accidents do not ordinarily occur in the absence of a defect and in those situations the inference that a product is defective is permissible." Further, when the defective condition of the product can be inferred from the circumstances of the incident, it is not necessary to define the defect precisely:

> In the type of case in which there is no evidence, direct or circumstantial, available to prove . . . exactly how the design was deficient,

> the plaintiff may nonetheless be able to establish his right to recover, by proving that the product did not perform in keeping with the reasonable expectations of the user. When it is shown that a product failed to meet the reasonable expectations of the user, the inference is that there was some sort of defect, a precise definition of which is unnecessary. If the product failed under conditions concerning which an average consumer of that product could have fairly definite expectations, then the jury would have a basis for making an informed judgment upon the existence of a defect.

Id. at 93 (internal citations and quotation marks omitted).

Rauscher v. GM Corp., 905 S.W.2d 158 (Mo. App. 1995) recognized the broad authority of the jury to infer a defective condition from circumstantial evidence in a case in which the vehicle was subject to sudden stalls and stops:

> The jury has broad authority to determine whether a defective and unreasonably dangerous condition is present. A jury could surely find that an automobile subject to unpredictable stalls and stops, which might occur in traffic, was in a defective condition, and that the condition was unreasonably dangerous. Expert testimony would not be needed; jurors themselves could appreciate the danger by reason of their own experience. . . . It is not necessary for the plaintiff to demonstrate the precise nature of the defect. The action is based not on a defect, but on a defective condition.

> The danger is demonstrated by the recurrence at unpredictable intervals, which might contribute to accidents such as the plaintiff sustained.

Id. at 160-61(internal citations omitted)(emphasis added).

The critical distinction between evidence of the specific nature of the defect and evidence of the defective condition of the product is again made clear in Williams v. Deere and Co., 598 S.W.2d 609 (Mo. App. 1980). There, the plaintiff claimed that a defective condition existed in the tractor because the tractor rolled and injured him after he had placed it in park. Id. at 611. The defendant argued that there was no evidence of a specific defect in the tractor. Id. at 612. Rejecting this argument, the court stated:

> The doctrine of strict liability in tort does not require impossible standards of proof. The proof must be realistically tailored to the circumstances. The existence of a defect may be inferred from circumstantial evidence with or without the aid of expert evidence. Considering the evidence and the reasonable inferences from it in the light most favorable to plaintiff, we believe that the evidence was sufficient to show that a defect likely caused plaintiff's injury. There was evidence that the tractor was placed in park on level ground and that it should not roll when in park. Common experience tells us that some accidents do not ordinarily occur in the absence of a defect and in those situations the inference that a product is defective is permissible. If it had been operating correctly it should have stayed in park and not rolled. Based on the

> evidence, the jury could reasonably find that there was a defect in the tractor which caused plaintiff's injury.

Id. (internal citations omitted).

In Williams v. Ford Motor Co., 411 S.W.2d 443 (Mo. App. 1966), the plaintiff claimed that an automobile was in a defective condition because it did not steer in the direction she intended. Id. at 445. The defendant argued that the plaintiff had failed to make a submissible case because her expert testimony regarding the defect in the steering mechanism was inconclusive. Id. at 447. In finding that the plaintiff had made a submissible case, the court stated:

> **[O]pinion evidence is not the only way of showing a defect** in the steering mechanism: **the existence of a defect may be inferred, just as negligence may be inferred, from circumstantial evidence**. In the usual operation of a new automobile, properly manufactured, it turns in the direction it is steered. The corollary is that if a new automobile is properly operated but does not turn in the direction it is steered, then the automobile is not properly manufactured.

Id. at 447-48 (emphasis added); accord Wadlow v. Lindner Homes, Inc., 722 S.W.2d 621, 625 (Mo. App. 1986) ("[T]he existence of a product defect may be inferred from circumstantial evidence with or without the aid of expert opinion evidence.").

In this case, the Cutlass performed in a manner that would not be expected unless a defective condition existed. Specifically, the Cutlass accelerated without driver input.

By eliminating pedal misapplication, Plaintiffs presented more than sufficient evidence for the jury to conclude, based on its own common experience, that this incident would not have occurred but for a defective condition in the Cutlass. No expert explanation of a specific defect causing the sudden acceleration was necessary.

Ignoring the testimony of Blatt and Wallingford, GM asks the Court to conclude that Plaintiffs' case depended upon Mr. Sero's testimony. To repeat: GM's argument assumes that a plaintiff must put on direct evidence showing the specific defect. As shown, this argument misstates Missouri law.

Sero's testimony merely confirmed the findings of GM's own engineers (as expressed by Meads, Rozanski and other GM engineers in company documents) and assisted the jury by offering an explanation of how the cruise control can malfunction and cause a sudden acceleration incident. However, Plaintiffs' theory of liability was by no means based solely upon Sero's testimony. Missouri courts have repeatedly held that expert opinion evidence is not required to establish the existence of a defective condition. See also RESTATEMENT (THIRD) TORTS: PRODUCTS LIABILITY, § 3, *comment c* ("plaintiff need not explain specifically what constituent part of the product failed").

GM also argues, for the first time on appeal, that there could be many other reasons a cruise control could not operate properly beyond a defect condition. This argument is a defense, the burden of which GM failed to bear at trial. GM presented no evidence of any foreign body or mechanical malfunction as a cause of the cruise control opening the throttle. To the contrary, GM conceded that the sudden acceleration incident

was the result of one of two causes: a defective cruise control or pedal misapplication. (T268, 496, 519, 1178; App.Br.80). Once Plaintiffs eliminated pedal misapplication–which they did through the testimony of Wallingford and Blatt–the only remaining alternative was a defective cruise control.

Finally, GM ignores a fundamental tenet of Missouri law. "If a jury [can] infer the existence of a defect from evidence which points 'reasonably to the desired conclusion and tend(s) to exclude any other reasonable conclusion,' then plaintiff has made a submissible case." Dorman v. Bridgestone/Firestone, Inc., 992 S.W.2d 231, 238 (Mo. App. 1999). Here, GM repeatedly acknowledged that there were only two possible causes for a sudden acceleration incident – pedal misapplication or cruise control malfunction. That stipulation was not limited to this incident, but applied generally to the operation of other vehicles. (T378). The evidence presented by Blatt and Wallingford eliminated pedal misapplication as a cause of the sudden acceleration incident; there was no compromise to the integrity of the cruise control; the only remaining viable cause, by GM's own stipulation, was a defective cruise control.

Plaintiffs made a submissible case on their theories of strict liability and negligence.

C. The Cutlass Was Unreasonably Dangerous.

GM argues that even if the Cutlass was defective in a factual sense it was not defective in a legal sense because the defect did not cause the product to be unreasonably

dangerous. GM makes two separate arguments: (1) that the Cutlass was not unreasonably dangerous because the defect in the Cutlass had never manifested in any other “W” car; and (2) that the Cutlass was not unreasonably dangerous because, even though the Cutlass had a propensity to suddenly and unexpectedly accelerate, the sudden acceleration could be stopped by application of the brake. Neither of these arguments has any merit.

GM is improperly attempting to provide a specific definition of "unreasonably dangerous." "The concept of unreasonably dangerous is an ultimate issue presented to the jury without further definition. 'The jury gives this concept content by applying their collective intelligence and experience to the broad evidentiary spectrum of facts and circumstances presented by the parties.'" Uxa v. Marconi, 128 S.W.3d 121, 128 (Mo. App. 2003). GM’s argument focuses on its preferred facts and its preferred interpretation of those facts and attempts to usurp the jury’s role by defining "unreasonably dangerous" in terms of its preferred factual interpretation of this case. The argument is both improper under Missouri law and without legal merit.

GM argues that a product cannot be unreasonably dangerous if the particular defect has never before manifested. Not surprisingly GM offers no legal support for this argument; this argument is directly contrary to the very notion of strict liability.

Product defect strict liability is based upon the existence of the defect, not upon the defendant's knowledge of the defect. That is why it is “strict” liability. Thus, it makes no difference whether the particular defect has manifested previously. The evidence in

this case clearly establishes that the Cutlass was defective because it suddenly accelerated without operator input or other mechanical error. Common sense alone dictates that a vehicle that suddenly accelerates without operator input is unreasonably dangerous.

GM's second argument–that Mrs. Peters could have stopped the sudden acceleration by applying the brake–is unsupported by the evidence. The evidence did not establish that Mrs. Peters had the time or opportunity to apply the brake before the sudden acceleration of the Cutlass caused her to sustain serious injuries that rendered her unconscious. Furthermore, even if GM had provided evidence indicating that Mrs. Peters had time to apply the brake, that evidence would have gone to comparative fault, not to submissibility. Regardless, GM failed to present any evidence on this question and GM had the burden of establishing this defense. At most this was a question of fact to be determined by the jury, which the jury determined in a manner adverse to GM. In addition, the defect witnesses testified that they had experienced sudden acceleration and that brake application had not terminated the sudden acceleration incident.[3]

[3] As will be discussed in Point III, the admission of the defect witnesses who could not stop the sudden acceleration with brake application is relevant to refute this argument of GM. This is an independent basis for admission of this evidence, aside from its admissibility to show defect.

D. The Evidence Supported The Jury's Finding That The Cruise System On The Cutlass Was Defective.

The evidence and reasonable inferences supporting the jury's finding of liability can be summarized as follows:

- Wallingford and Blatt provided a basis for the jury to conclude that the Cutlass operated in a manner that would not be expected absent a defect (i.e. the Cutlass accelerated without driver input). Based on this testimony, the jury could properly conclude that the Cutlass was defective.
- Wallingford and Blatt also eliminated pedal misapplication as a cause of the sudden acceleration incident. Because GM agreed that the sudden acceleration incident could only have been caused by the cruise control or pedal misapplication, the jury could properly conclude that the sudden acceleration incident was caused by a defect in the cruise control.
- Sero's testing on the Peters' vehicle confirmed the concerns of GM's own engineers regarding the propensity of the three-mode cruise control to experience sudden acceleration incidents. Sero also provided the jury with an explanation of how the cruise control can malfunction. However, the jury was not required to accept Sero's explanation in order to find that the cruise control was defective. The jury's finding that the cruise control was in a defective condition is supported by the testimony of Wallingford and Blatt as described above.

These facts established a substantial basis for the jury's conclusion that the cruise system on the Cutlass was defective.

Point I should be denied.

II. SERO TESTIMONY

> *"GM's failure to assert its objection to Mr. Sero's testimony at trial waived the objection, and its post trial motion raising the issue was not sufficient to preserve the issue for review without proper objection at trial."*
>
> Peters v. General Motors, 2006 WL 88563 at *9 (Mo. App. W.D. 2006)

To preserve an evidentiary issue on appeal, a party is required to object at trial to the introduction of the evidence and to reassert the objection in post trial motions. Brandt v. Pelican, 856 658, 664 (Mo. banc 1993). As the Court of Appeals correctly concluded, GM failed to preserve the error on which it now relies in Point II. GM does not request plain error review.

Should this Court (respectfully, improperly) conduct a *sua sponte* review of this issue, "[t]he determination of whether or not a person qualifies as an expert witness, and whether or not his testimony is to be admitted, is a matter of discretion for the trial court and its ruling will not be disturbed on appeal absent a clear showing of abuse." Missouri Department of Transportation v. Safeco Insurance Co., 97 S.W.3d 21, 38 (Mo. App. 2002). An appellate court should only reverse the trial court's ruling regarding the admission of expert testimony when the ruling "'is so arbitrary and unreasonable that it shocks the sense of justice and indicates a lack of careful consideration.'" James v. James, 108 S.W.3d 1, 4 (Mo. App. 2002).

A. GM Failed To Preserve Its Objection To Sero's Testimony.

GM has failed to preserve any objection it may have had to Sero's testimony because GM failed to object to Sero's testimony at trial at any time prior to the admission of Sero's testimony into evidence. Although GM did file a motion *in limine* regarding Sero's testimony prior to trial, that motion does not preserve any issue for appeal.

"A motion *in limine* simply does not preserve the right to challenge alleged error on appeal. It is a timely objection at trial, when the evidence is offered, which preserves the matter for review, and not the rejection of a motion *in limine*. After the denial of a motion *in limine*, a specific objection must be made at the time the evidence discussed in the motion *in limine* is introduced at trial in order to preserve the issue for appeal." Henderson v. Fields, 68 S.W.3d 455, 479 (Mo. App. 2001) (Internal citations and quotation marks omitted.); see also Hancock v. Shook, 100 S.W.3d 786, 802 (Mo. banc 2003) ("A motion *in limine*, by itself, preserves nothing for appeal.").

GM did not make any objection at trial that set forth the matters raised in its motion *in limine.* Indeed, at the time Plaintiffs offered Mr. Sero's testimony into evidence there was no objection. (T545). The videotape of Sero's testimony was played to the jury in three different stages, during an approximately five-hour period. (T545-47). No objection to Sero's testimony was made during that time period. (T545-47). After the jury had heard Sero's testimony, Plaintiffs offered both the videotape (PEX 587) and the

transcript of the videotape (PEX 586) into evidence. (T548). GM indicated that it did not object to the admission of these exhibits. (T549).

GM's attempt to overcome its lack of objection is telling by its evasiveness. Had GM objected to Sero's testimony in the manner required to preserve the point, GM's brief would surely direct this Court to the location of that objection -- especially given the court of appeals rebuke of GM's argument.

GM's discussion of its "objection" is relegated to footnote 17. (App.Br.69,n.17). Footnote 17 refers the Court to footnote 3. Footnote 3 references GM's *in limine* objection to Sero's testimony, and then claims that the trial court ruled with regard to Sero's testimony that "all of the objections we made are continuing." (App.Br.29,n.3). This assertion is simply untrue.

The court never granted any continuing objections regarding Sero's testimony.[4] During the portion of the trial preceding the admission of Sero's testimony, the only continuing objections that were recognized by the trial court were objections to evidence of other similar incidents. (T226-27, 472, 532-33).

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[4] There is a section of the transcript in which the trial court heard objections to certain portions of Sero's deposition. (T334-62). This procedure was necessary because Sero's testimony was offered by videotape deposition. (PEX586 & 587; T 545-47). However, GM did not make any overall objection to the admissibility of Sero's deposition testimony. Nor did GM reassert the criticisms that it has previously leveled in its motion *in limine*.

As a matter of law, "a continuing objection presupposes an initial objection to all questions in a given line of questioning. This initial objection must be made at trial to preserve a claim for review." State v. Christian, 184 S.W.3d 597, 605 (Mo. App. 2006) (Internal citations omitted.). "Even if the trial court permits a continuing objection, its scope is limited to the basis upon which it was granted." Slankard v. Thomas, 912 S.W.2d 619, 628 (Mo. App. 1995). In this instance, there was no initial objection to Sero's testimony that could be continuing.

GM never objected to Sero's testimony during trial. GM never received the trial court's leave to have a continuing objection to Sero's testimony. GM has waived this issue for appeal. The Court of Appeals, Western District so found.

B. The Standard For Admission Of Expert Testimony.

If this Court chooses to overlook GM's failure to object to Sero's testimony, then this Court's consideration of the admissibility of Sero's testimony should be guided by §490.065, RSMo. (2005).

> 1. In any civil action, if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. . . .
>
> * * *

> 3. The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing and must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable.

§ 490.065, RSMo.

In State Board of Registration for the Healing Arts v. McDonagh, 123 S.W.3d 146 (Mo. banc 2003), this Court explained that although an expert's opinions must be based upon facts and data of a type that are reasonably relied upon by other experts in the field, this does not mean that the expert's conclusions must be consistent with those of other experts. Id. at 157. The fact that an expert looks at the same data as other experts, but reaches a different conclusion, does not render that expert's opinion inadmissible. "The essential test of expert opinion evidence is whether it will be helpful to the fact finder." Fierstein v. DePaul Health Center, 24 S.W.3d 220, 226 (Mo. App. 2000).

Furthermore, the courts have recognized that "[q]uestions concerning the sources and bases of an expert's opinion affect the weight rather than the admissibility of the opinion. They are credibility issues properly left to the jury." Sanders v. Hartville Milling Co., 14 S.W.3d 188, 208 (Mo. App. 2000); accord, Wulfing v. Kansas City Southern Industries, Inc., 842 S.W.2d 133, 152 (Mo. App. 1992). "Any weakness in the factual underpinnings of the expert's opinion or in the expert's knowledge goes to the weight that testimony should be given and not its admissibility. In general, the expert's

opinion will be admissible, unless the expert's information is so slight as to render the opinion fundamentally unsupported." Jones v. Grant, 75 S.W.3d 858, 863 (Mo. App. 2002); accord, Alcorn v. Union Pac. R.R. Co., 50 S.W.3d 226, 246 (Mo. banc 2001).

C. Sero's Testimony Was Properly Admitted Into Evidence.

Sero's testimony was based upon general electrical engineering principles and consisted of explanations and applications of facts and methodologies that are widely recognized in the electrical engineering community. (PEX586, 11 [Sero]). Thus, Sero's testimony was admissible pursuant to the standard set forth in section 490.065 RSMo. and in McDonagh. Furthermore, ***Sero's testimony merely served to confirm the testimony of GM's own experts and engineers***.

Sero conducted testing on the Sero vehicle that confirmed the concerns of GM's own engineers regarding the propensity of the three-mode cruise control to experience inadvertent actuation of the throttle. Using a portable oscilloscope, Sero detected current flows in the cruise control when the cruise control was in the "off" position. (PEX586, 47, 49-50 [Sero]). GM does not dispute that a portable oscilloscope is an appropriate instrument for detecting current flows in an electronic device. Nor does GM dispute that Sero did detect current flows in the cruise control when the cruise control was in the "off" position. Thus, Sero's use of the portable oscilloscope, and the testing that he performed with the oscilloscope, is entirely consistent with the methodology normally employed by experts in the field of electrical engineering.

Sero testified that a single electrical fault can occur in the cruise control circuit board due to the fact that the vent and vacuum outputs to the servo are tied together in operation. (PEX586, 67 [Sero]). Sero explained that this condition allows stray current to come into the circuit board. (Id.67). Sero explained two paths by which transient signals can travel into the cruise control circuit board. (Id.66-67). Sero also testified that, had the circuit board in the Cutlass used resistors in the proper locations, the malfunction of the cruise control could not have occurred. (Id.78). He explained that the use of resistor arrays in the cruise control was not sufficient to protect the cruise control from transient signals because resistor arrays are integrated circuit chips that are susceptible to the same transient signal problems as other circuit chips. (Id.78-79).

Sero's testimony regarding the potential for a single electrical fault in the cruise control to cause an unwanted acceleration is consistent with the testimony provided by GM's own engineers. Meads, the engineer who served as the head of GM's Cruise Control COE, testified that a single electrical fault could actuate the throttle on a three-mode cruise control system. (PEX572, 24-25[Meads]). Rozanski, the engineering group manager for cruise control systems at GM, testified that a single electrical fault could actuate the throttle in a three-mode cruise control system. (PEX574, 12-13[Rozanski]). Meads testified that he had produced throttle actuation by electrical spikes in the laboratory. (PEX572, 16[Meads]). Sero's testimony merely explained the findings of Meads and Rozanski.

Sero also testified that one of the paths that would allow transient signals to enter the cruise control circuit board had previously been identified by Hughes Aircraft in its study of transient-signal-related problems in 1988. (PEX586, 111-12 [Sero]). Again, this illustrates that Sero was merely confirming what had already been determined by others.

As for Sero's testimony regarding the problems that transient signals pose in cruise control design, GM's own expert witness, Crawford, testified that designers of cruise controls have been aware of the problem of transient signals, and the need to protect against them, since the advent of electronic components on cars in the 1970s. (T991). In fact, Crawford testified that cruise control units are routinely tested for the effects of transient signals (T989) and he acknowledged that without the use of resistors and other devices to protect a cruise control, transient signals could cause unwanted accelerations. (T1120). Crawford agreed that "transients exist on all automobile engines. It's a fact of life from the beginning of cars." (T1006-07). Again, Sero was merely confirming what GM's experts already knew.

Finally, GM produced documentation that directly supported Sero's contention that transient signals pose a risk to cruise control units. Within a week of trial, GM produced a 1988 document entitled "Unwanted Acceleration: A challenge to the Automotive System Engineer" (PEX748). A diagram that was attached to this report identified "transients" as "known factors" that caused "unwanted accelerations" in "cruise control system[s]." (Id.308075). This document clearly indicates that GM

recognized that transients entering a cruise control unit can cause an unwanted acceleration.

GM cannot seriously dispute the fact that transient signals pose a significant risk to cruise control units and that this risk was known by GM as early as 1988. Meads, who produced throttle actuation by electrical spikes in the laboratory, (PEX572,16[Meads]). was so concerned that "we made sure that everybody that was in the release group engineering activity that had anything to do with cruise experienced what it would be like[] to be sitting in a parking lot and drop this thing into gear and just have the cruise take off on you." PEX572,16[Meads].

The evidence in the record plainly establishes that not only was Sero's testimony based upon facts and data that are reasonably relied upon by experts in the field of electrical engineering, but Sero's testimony was consistent with the testimony of GM's own experts and engineers.

D. GM's Focus On Sero's "Theory" Is Inconsistent With Missouri Law.

Recognizing that Sero's testimony is admissible under §490.065, GM has chosen to focus upon Sero's conclusions themselves rather than the basis for his conclusions. GM argues that Sero's "theory" is not generally accepted by the electrical engineering community. This line of argument is directly contradictory to this Court's rejection of the Frye general acceptance standard. As this Court stated in McDonagh: "[T]his Court is not in effect readopting the Frye standard under another name. Nothing in section 490.065 suggests that the conclusions reached in reliance on the facts and data must be in

conformity with the general . . . consensus or must be generally accepted." McDonagh, 123 S.W.3d at 157.

GM's argument also focuses upon Sero's opinion that transient signals can interfere with the functioning of the three-mode cruise control used in the Cutlass. Sero based this opinion upon his testing of the Cutlass and his examination of the circuit board used in the three-mode cruise control. Sero's opinions are founded upon facts and data that are reasonably relied upon by experts in the field of electrical engineering. While GM may disagree with Sero's opinion, disagreement with an expert's opinion – as opposed to the facts on which the opinion is based – does not provide a basis for excluding the expert's testimony.

Sero's testimony was clearly helpful to the jury in that it provided the jury with an explanation of how the cruise control can malfunction. Sero's testimony was based on principles of transient interference widely recognized by experts in the electronics and automotive communities. Therefore, it meets the general standard for admission of expert testimony. The trial court did not abuse its discretion in admitting Sero's testimony.

Point II should be denied.

III OTHER SIMILAR INCIDENT EVIDENCE

Review of decisions to admit other similar incident ("OSI") evidence is for abuse of discretion. "Trial courts have wide discretion on issues of admission of evidence of similar occurrences. Pierce v. Platte-Clay Electric Co-op, Inc., 769 S.W.2d 769, 774 (Mo. banc 1989)." Newman v. Ford Motor Co., 975 S.W.2d 147, 151 (Mo. banc 1998).

As to the propriety of discovery sanctions, the trial court is vested with broad discretion to control discovery. Goede v. Aerojet General Corp., 143 S.W.3d 14, 22 (Mo. App. E.D. 2004). This discretion includes the trial court's choice of remedies to address the non-disclosure of evidence during discovery. Id. "An abuse of discretion exists when the trial court's ruling is clearly against the logic of the circumstances before the court at that time and is so unreasonable and arbitrary that it shocks one's sense of justice and indicates a lack of careful consideration. Scott v. LeClerq, 136 S.W.3d 183, 190 (Mo. App. 2004), *quoting* Green v. Fleishman, 882 S.W.2d 219, 223 (Mo. App. W.D. 1994). That this Court might have imposed a different sanction under the circumstances does not amount to an abuse of discretion; the issue is whether the trial court could have reasonably chosen as it did. Scott, 136 S.W.3d at 190.

Introduction

Missouri law has long recognized the admissibility of OSI's under proper circumstances. Those circumstances are present in this case. Plaintiffs introduced 213 notice OSI's set out in GM 1241 reports for the purpose of showing GM's knowledge of sudden acceleration incidents without pedal error. These OSI's were admitted by the trial

court both as a sanction for GM's failure to produce its 1241 reports and, independently, because they were substantially similar on the issue of notice of sudden acceleration events. These OSI's had been examined by Plaintiffs' expert, Jerry Wallingford; each involved a W car and: (1) the driver had placed the car into reverse or drive from park, (2) the driver experienced a sudden acceleration incident, and (3) the sudden acceleration incident did not involve pedal error or another mechanical defect in the car. These OSI's were not displayed to the jury or discussed individually but were merely referred to as a number collected in a box. The trial court admonished the jury that these OSI's were admitted solely for the purpose of notice.

Of the 213 notice OSI's admitted, 74 specifically mentioned the presence of cruise control in the vehicle. The remaining 139 did not mention, one way or the other, whether the vehicle had cruise control. At trial, GM provided no evidence that any of the 139 did not have cruise control, despite possessing this information. The only testimony was from Wallingford, who testified that "virtually all" W cars were manufactured with cruise control. For GM now to complain that Plaintiffs could not determine with certainty which cars had cruise control is for GM to admit that its late production of the 1241s prejudiced the Plaintiffs' preparation for trial.

Seven witnesses testified to similar sudden acceleration events similar to Mrs. Peters' sudden acceleration. The testimony of these witnesses was admitted to show dangerous condition/defect. The dangerous condition/defect evidence was also relevant to refute GM's defense that sudden acceleration incidents that were not otherwise

explained were always the result of pedal misapplication. This wholly independent legal basis permits admission of the evidence whether or not its admission to show dangerous condition/defect was proper.

A. The Notice OSI's

1. The Trial Court's Sanction

GM's contumacious discovery behavior is shown in a timeline attached as Appendix 25-26. Plaintiff requested production of customer complaints, claims and lawsuits related to sudden acceleration by GM. GM failed to turn over any of these documents for over a year and did not do so until compelled to do so by the trial court. GM then assured the trial court three times that it had turned over all relevant complaints. Despite these representations to the court, GM produced 436 additional complaints on the eve of trial, after the imposition of sanctions, and ***after*** the Wallingford deposition.

Plaintiffs moved to strike GM's answer. LF179. The trial court adopted a lesser sanction, leaving to the jury the ultimate factual issue. The trial court could have removed that ultimate factual issue from the jury's consideration had it chosen to strike GM's answer.

The trial court ordered that customer complaints not voluntarily disclosed by GM were "admissible at trial under the business record exception to hearsay, to ***establish knowledge by defendant*** but not as proof of the defect." (LF1018)(App.2-8)(emphasis added).

The trial court's Order specifically found:

- "GM has engaged in a pattern of discovery abuse throughout this case."
- GM attempted "to restrict Plaintiffs' discovery by model year and engine type without any reasonable basis" even though "GM was aware at the time of the restriction that the engine type and model year made no difference with respect to the components at issue in this case."
- "GM failed to comply, or even attempt to comply with the Court's Order" as "ordered by this Court on May 15, 2002…."
- "GM failed to broaden its production of documents even after the Court ordered it to do so.
- "GM affirmatively misled the Plaintiffs by producing lawsuits and customer complaints that it represented were in compliance with the Court's Order despite knowing that the search was conducted before the Order was entered."
- "GM acted with complete indifference to the Order issued by this Court."
- "Had Plaintiffs not expended the time and expense to request and conduct a computer database search, none of the documents would have been found, and General Motor's violation of this Court's Order would not have been discovered."

- "At the time of the hearing GM was still in violation of the May 15, 2002 Order as it had failed to produce all the supporting documentation for the lawsuits, claims, and complaints identified."
- "The Court finds that the above discovery violations have resulted in prejudice to the plaintiffs."
    - "Plaintiffs have deposed three corporate representatives and produced all of their experts without the benefit of the documents which were not produced."
    - "Plaintiffs have been further prejudiced by having to go to great expense and time to find these documents through third sources when they should have been produced during the normal course of discovery."
    - "This has resulted in plaintiffs having less time to develop the merits of the case."
    - "Trial in this matter is set for December 9, 2002 and obtaining documents at this late date has prejudiced plaintiff's ability to prepare for trial."

(LF1015-17).

2. The Propriety of the Sanction

GM argues that the sanction imposed by the trial court for its failure to produce documents requested pursuant to Rule 58.01 was improper. GM cites no case in support

of this argument, relying on cases that deny a court the ability to impose monetary sanctions for failure to answer interrogatories. See, Fuller v. Padley, 628 S.W.2d 719 (Mo. App. W.D. 1982) and Roth v. Roberts, 672 S.W.2d 709 (Mo. App. E.D. 1984).

Rule 61.01(d) expressly allows the trial court to "*make such orders in regard to the failure as are just*" when a party fails to produce documents in a timely manner. Goede sets out the proper analysis of the "just" standard.

In Goede, the defendant failed to answer interrogatories. The trial court "instructed the jury that it was established as a fact that the decedent was exposed to Aerojet asbestos through the work clothes of her father during the period of 1959-1964. And … the court instructed the jury that it was a fact that Aerojet was aware of the hazards of asbestos that were known in the industry prior to 1964." Appellant challenged the propriety of the sanctions, which were not expressly authorized by Rule 61.01, on the grounds that the trial court could not remove from the jury its duty to find an ultimate fact. The Court of Appeals rejected defendant's argument.

> Rule 61.01 authorizes a court to sanction a party for failing to answer interrogatories or for providing incomplete or evasive answers to interrogatories…. The trial court could have struck Aerojet's pleadings or entered a default judgment, as the plaintiffs requested. The court did not do this, but rather, it imposed a sanction that addressed the precise effects of

> Aerojet's false answers the deprivation of plaintiffs' opportunity to identify those missile parts in which asbestos was actually used and that the decedent's father possibly machined, and Aerojet's knowledge of the hazards of asbestos. The trial court was well within its authority and did not abuse its discretion in imposing the sanctions that it did.

Id. at 22-23.

Here, faced with a defendant who refused to produce documents and then gave the trial court false information, the trial court merely removed GM's ability to object to plaintiff's use of 1241 reports to show GM's knowledge of the existence of sudden acceleration incidents.

Rule 61.01(d) expressly provides that the trial court may "refuse to allow the disobedient party to…oppose designated claims." The trial court's Order expressly provided as a sanction that the 1241 reports not produced by GM were admissible "to ***establish knowledge by defendant"*** of sudden acceleration incidents (LF1018), thus prohibiting GM from asserting that it did not know of sudden acceleration issues in its W cars.

The trial court's sanction was carefully tailored to address the specific contumacious conduct of GM – refusing to produce evidence of its knowledge of sudden acceleration incidents.

Rule 61.01 (per Goede) permitted the trial court to instruct the jury that, as a matter of decided fact, GM knew that its cars had sudden acceleration problems. It

follows "[a]s a matter of logical deduction, if a court has been granted certain authority, it must possess all component powers of such authority." Id. at 22. The trial court could properly impose the lesser sanction of forbidding GM from opposing the admission of 1241 reports that showed GM's knowledge.

The rules of discovery are designed to allow the litigants to determine the facts prior to trial, obtain access to information about the respective contentions, to preserve evidence, prevent concealment and unjust surprise, and formulate issues for trial. Moore v. Weeks, 85 S.W.3d 709, 722 (Mo. App. 2002). The rules must be enforced to achieve these objectives and if this Court's rules are to be effective, appropriate sanctions must be imposed for violations. Id.; Combellick v. Rooks, 401 S.W.2d 460, 464 (Mo. 1966).

Courts have imposed a variety of sanctions for discovery violations, depending upon the factual situation presented. See, Redfield v. Beverly Health and Rehabilitation Services, Inc., 42 S.W.3d 703, 711 (Mo. App. 2001)(broad discretion granted to trial court to control discovery extends to the trial court's choice of remedies in response to the non-disclosure of evidence or witnesses during discovery.) To deny the trial court this authority, specifically authorized by Rule 61, is to place at risk the judicial system's ability impartially to adjudicate a matter by permitting a party improperly to hide relevant evidence or otherwise to hamper the presentation of the opposing party's claim.

GM may assert that all of the 213 notice OSI's were not introduced as a result of the sanction, but that some of them were voluntarily provided by GM. GM failed to offer

a specific objection to the notice OSI's at the time they were admitted by the trial court. During the motion in *limine* hearing GM asserted that some of the 213 OSI's had been voluntarily produced by GM and were not subject to the sanction. GM claimed that these OSI's must be admitted as ordinary evidence, with a proper foundation, and that they were hearsay. Plaintiff's counsel responded that the sanction order covered the OSI's that were to be introduced. T.307("this was part of the October 24 sanction order"). GM's objection at the time of the actual admission of the OSI's failed to assert as specific ground the nonsanction status of any OSI. (T483)("Your Honor, over our objection"). Moreover, GM never made any argument as to which, or how many OSI's fell outside the sanction. These twin failures waived the claim it now asserts.

Even had there been a proper objection to specific OSI's, however, the notice OSI's were properly admitted, as will be explained below.

3. The Notice Evidence

The trial court conducted an independent evidentiary analysis to admit the notice OSI's apart from the sanction it imposed for some of the 1241 reports. Plaintiffs offered the 1241 reports only to establish GM's knowledge (notice) of sudden acceleration incidents. (T373)("They are not being offered to show [whether they have a cruise control]. They're being offered to show notice of a sudden acceleration incident"). Understanding the limited purpose for the use of the notice OSI's, the trial court carefully instructed the jury to avoid the jury reading more into the incidents. The "Form

1241s … should be considered by you only as notice to GM regarding these complaints." (T478-79). This instruction properly cabined the jury's consideration.

OSI evidence is permitted to show notice of a dangerous condition. "When evidence of other accidents is introduced to show notice of danger, the similarity in the circumstances of the accidents need not be completely symmetrical." Pierce at 775. Evidence is admissible if it is "relevant to show that appellant was aware of the risk." Id. Similarity is sufficient "'if the accident is offered to prove notice…[and] was of a kind which should have served to warn the defendant.'" 1 Weinstein & Berger, Weinstein's Evidence § 401[10], at 401-66-67." Eagleburger v. Emerson Elec. Co., 794 S.W.2d 210, 215 (Mo. App. S.D. 1990)

GM asks this Court to adopt a different standard–to require complete symmetry to permit notice evidence. It would require a showing that all of the sudden acceleration events involved cars with cruise controls (despite the fact that its failure timely to produce the evidence made that knowledge unobtainable).

This argument is somewhat curious in that GM's evidence was that cruise controls are irrelevant to sudden acceleration events. GM's Robert Sinke, testified "cruise controls are not an important factor in SAI [sudden acceleration incidences]" (T1179). Nevertheless, GM now argues that the presence of cruise controls in vehicles is logically relevant, and highly so, to the limited question whether GM was aware of non-pedal-error sudden acceleration events in its vehicles.

GM's argument depends on its appellate denial of what its lawyers told the trial court and the jury at trial – that sudden acceleration could have only two causes: pedal misapplication/error or cruise control malfunction. This stipulation is highly relevant to the similarity analysis. This is because ***the degree of similarity required to admit an OSI for purposes of notice is a function of the purpose for which the evidence is offered.*** The similarity required is "a similarity in such circumstances or conditions as might supposedly affect the result in question." Poston v. Clarkson Const. Co., 401 S.W.2d 522, 526 (Mo. App. 1966)(emphasis added). Poston held it was error not to admit OSI evidence of other property damage on the issue of the force of a blast. *accord*, Eagleburger, citing Exum v. General Elec. Co., 819 F.2d 1158, 1162-63 (D.C. Cir. 1987)("how substantial the similarity must be is in part a function of the proponent's theory of proof").

The similarity of conditions must be substantial in the sense that the differences in conditions do not materially affect the probative value of the evidence. "In making this determination, the trial court must be guided by the purpose for which the evidence is sought to be used, ***whether it is sufficiently similar in respects relevant to that purpose***, and whether it is unduly prejudicial or confusing when used for that purpose." State ex rel. Malan v. Huesemann, 942 S.W.2d 424, 431 (Mo. App. 1997)(emphasis added).

Here is the stipulation GM now denies.

As the trial court considered admission of the OSI-notice evidence, the following colloquy occurred:

Mr. Evans: And Judge, we know from – I think everybody agrees ***there are only two ways to accelerate the vehicle***, ***either the foot of the driver or this cruise control***, in the manner described in these 1241s….

Mr. Squibb [for GM]: It has to be – yeah we agree, ***there are two ways***, but you have to show that a cruise control was even a possibility….

(T377-78)(emphasis added).

Moreover, GM's position was that sudden acceleration never occur as a result of cruise control malfunction, only pedal misapplication. GM's expert, Robert Sinke, testified that sudden acceleration "rates are not significantly different for cruise control equipped vehicles versus those without them, ***cruise controls are not an important factor in SAI [sudden acceleration incidences.***]" (T1179)(emphasis added). GM's expert Daniel Crawford testified that sudden acceleration incidents are always the result of pedal error.

Mr. Evans: [I]f I told you, Mr. Crawford, that every one of those was an allegation of sudden acceleration and, in every one of those, General Motors found nothing wrong with the car, you could tell me that every one of those was pedal error; isn't that correct. That would be your opinion?

A. That would be my opinion.

(T1090, also T1086, 1096).

Mr. Wallingford, Plaintiffs' expert, testified that the 1241s eliminated GM's pedal misapplication explanation for sudden acceleration. Logically that left only cruise

control as the cause of sudden acceleration. Wallingford's criteria eliminated non-cruise control causes for sudden acceleration because his 213 OSI's included only 1241 complaints where (1) the vehicle accelerated without drive input (no pedal error); (2) the vehicle was initially stopped, and (3) no other mechanical problems were identified as causal factors.[5](T475-76)

Given GM's position at trial, when pedal misapplication and other mechanical factors are eliminated as potential causes of sudden acceleration, logic dictates and Wallingford's criteria leaves only cruise control as the cause of sudden acceleration, even if the 1241 form does not so indicate.

But even this logical step is unnecessary. The issue that the OSI's addressed was not whether there was a defect in the cruise control, but whether GM had notice that something other than pedal error was causing sudden acceleration incidents.

When the evidence and the trial court's rulings on the issue of non-pedal-error sudden accelerations are viewed in context, the actions of the trial court conform completely to Missouri law. The trial court permitted Plaintiffs to show that GM knew

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[5] GM's lack-of-cruise-control argument misstates Wallingford's testimony. Wallingford testified that GM's "representative indicated that virtually all" GM vehicles were equipped with cruise control. (T392). Wallingford specifically rejected GM's suggestion that only eighty percent of GM vehicles are equipped with cruise control. (T392).

sudden acceleration events were occurring without pedal error causes. That was all the notice OSI's accomplished.

GM's position essentially argues that this Court's decision in Newman should be overruled. In Newman, plaintiffs alleged that an occupant could ramp out of a defective seat even though wearing a seat belt. Ford's defense was that a seat belt would prevent ramping out by the occupant. This Court affirmed the admission of OSI's that even involved differing body style vehicles (SUV, minivan, sedan) made by different manufacturers to show that a belted passenger could ramp out of a seat defective seat when struck from behind. (See App.33-46)(Ford's OSI Point in Newman).

In Jones v. Ford Motor Co., 559 S.E.2d 592 (Va. 2002), the plaintiff alleged that a defect in the cruise control of her Lincoln Town Car caused a sudden acceleration incident. Id. at 594. The parties agreed at trial that there were only two possible causes for a sudden acceleration incident: use of the cruise control or application of the accelerator. Id. at 595. The plaintiff's theory was that the sudden acceleration incident was caused by a defect in the cruise control mechanism that allowed a transient signal to unexpectedly activate the cruise control. Id. at 595-96. Ford's experts testified that the sudden acceleration incident was the result of pedal misapplication. Id. at 596.

The plaintiff in Jones sought to admit four similar incidents at trial regarding sudden acceleration incidents that had occurred in Ford vehicles. Id. at 594, 596-99. Ford argued that these similar incidents should not be admitted because Ford admitted that it was aware of other persons claiming to have experienced sudden acceleration

incidents. Id. at 599. The plaintiff argued that the similar incidents were still admissible on the issue of notice because Ford specifically denied that sudden acceleration incidents could occur without operator error (i.e. pedal misapplication). Id. at 599-600, 601. The trial court did not allow the admission of these similar incidents. Id. at 600.

The Virginia Supreme Court held that the trial court had erred in excluding the similar incidents offered by plaintiff. Id. at 601. The court noted that the similar incidents should have been admitted because the issue of notice was relevant to the plaintiff's failure to warn claim and because "Ford specifically disavowed that its manufactured vehicles could accelerate without operator error." Id. at 600-01. The court noted that the similar incidents met the substantial similarity test given Ford's admission that sudden acceleration incidents are either caused by the cruise control or by pedal misapplication:

> [T]he deposition testimony before this Court satisfies the test of substantial similarity. **Ford concedes that the speed of a car can only be controlled by one of two factors, an act by the driver or the cruise control system**. Three of the deponents testified that they did not apply the accelerator pedals, but nonetheless, their cars accelerated.

Id. at 602 (emphasis added).

Here, GM defended the case on the theory that pedal error caused the accident (and all other sudden acceleration incidents.) Whether GM had notice of non-pedal error

sudden acceleration incidents was made relevant by GM's defense; the admitted OSI's were similar for purposes of that issue.

4. The Hearsay Rule Does Not Bar Admission Of The 1241 Reports.

The 1241 reports were not barred from admission by the hearsay rule because the 1241 reports were admitted on the issue of notice and were not admitted to establish the truth of the matter asserted therein. Missouri courts have long recognized that customer complaints that are offered on the issue of notice are not barred from admission by the hearsay rule because the statements are not offered to establish the truth of the matter asserted. Vinyard v. Vinyard Funeral Home, Inc., 435 S.W.2d 392, 396 (Mo. App. 1968).

In Rinker v. Ford Motor Co., 567 S.W.2d 655 (Mo. App. 1978), the plaintiff sued the defendant automotive manufacturer under the theory that the vehicle was defective because a component of the fast idle cam was subject to break and, when broken, could cause the accelerator to stick. Id. at 658. At trial, the court allowed the plaintiff to admit evidence of 29 customer complaints of a jammed throttle Awhich ***might*** have been attributable to fast idle cam breakage.≅ Id. at 663 (emphasis added). The defendant argued on appeal that these complaints should have been barred from admission by the hearsay rule. Id. However, the appellate court rejected this argument. AEvidence that such reports had been received by Ford was admissible on the issue of knowledge and such evidence for that purpose is not precluded by the hearsay rule.≅ Id.

The 1241 reports here were properly admitted in this case for the purpose of establishing General Motors= knowledge of other sudden acceleration incidents that were not the result of driver input.

5. The OSI's Were Independently Admissible to Refute GM's Pedal Error Defense.

GM claimed that sudden acceleration does not occur without pedal error. The notice OSI's showed complaints to GM by customers who experienced sudden acceleration that did not result from pedal error or a mechanical malfunction. The OSI evidence directly refuted GM's defense. The evidence was admissible for that reason. "When a material part of one party's defense is to show the infrequency of an occurrence, or that an occurrence is very rare, an opponent may present relevant evidence to refute the inferences raised by that defense." Gerow, 987 S.W.2d at 365 (Mo. App. 1999).

Evidence that is admissible for one purpose may not be excluded because it is inadmissible for another purpose. Pierce at 775.

6. No Prejudice Resulted From The Admission Of the 1241 Reports.

GM finally produced 1,600 W car sudden acceleration customer complaints. (T365) Nevertheless, Plaintiff did not inform the jury of all 1,600. Rather, Wallingford went through as many as he could (given the late disclosures) and testified to 74

complaints of sudden acceleration involving cars with cruise control. He also testified to another 139 complaints that had a sudden acceleration incident without driver input. Virtually all of these cars had cruise controls. (T393).

There is no dispute that 74 of the notice OSI's involved W cars with cruise control. Even under GM's artificially narrow similarity standards, these OSI's were properly admitted.

Should this Court determine that some of the 1241 reports should not have been admitted into evidence, that decision was not prejudicial to GM. Seventy-four OSI's is such a substantial number that the jury could reasonably determine that GM had notice of non-pedal-error caused sudden accelerations, without more. The additional 139 OSI's were cumulative of the 74 and were offered into evidence by exhibit number and were not presented to the jury either as a group or individually (T473). And even if Wallingford's testimony that "virtually all" of the cars had cruise control is ignored (fn. 2, supra) and GM's unsupported theory that only 80% of the cars had cruise controls is credited (App.Br.38 fn 8), of the 213 notice OSI's admitted as a group, 185 involved cars with cruise controls. (74 identified by Wallingford, plus 111 (80% of the remaining 139)) (T483). That the jury learned of 213 OSI's when the jury (perhaps) should only have learned of 185, is hardly prejudicial.

B. Defect OSI's

GM attempts to obfuscate this issue by intermingling Sam Sero's testimony with that of Jerry Wallingford and Dr. Blatt. To repeat: Plaintiff's claim of defect was not

based upon any specific malfunction that was discussed by Mr. Sero. Plaintiffs= claim of defect was based on the testimony of Mr. Wallingford and Dr. Blatt. That testimony established that the Cutlass continued to accelerate without any input from Mrs. Peters – that is after Mrs. Peters had lost both her arm and consciousness.

The jury may hear evidence of other similar incidents to show defect if the offering party establishes that the incidents A(1) [were] of like character, (2) occur[ed] under substantially the same circumstances, and (3) result[ed] from the same cause. The two occurrences do not need to be completely symmetrical.≅ Thornton v. Gray Automotive Parts Co., 62 S.W.3d 575, 583 (Mo. App. 2001); Govreau v. Nu-Way Concrete Forms, Inc., 73 S.W.3d 737, 741-42 (Mo. App. 2002).

"The doctrine of strict liability in tort does not require impossible standards of proof. The proof must be realistically tailored to the circumstances…. The existence of a defect may be inferred from circumstantial evidence with or without the aid of expert evidence." Uder v. Missouri Farmers' Assoc., 668 S.W.2d 82, 93 (Mo. App. W.D. 1983), *accord*, Daniel v. Ind. Mills, Inc., 103 S.W.3d 302, 309-10 (Mo. App. S.D. 2003)(evidence inferring defect need not exclude all possibility of another cause of the accident; the evidence need not be undisputed); Weatherford v. H.K. Porter, Inc., 560 S.W.2d 31, 34 (Mo. App. 1977)(circumstantial evidence does not require proof of a specific defect; evidence must only support reasonable inference that defect caused accident without resort to conjecture and speculation); Consalo v. General Motors Corp., 609 A.2d 75, 77 (N.J. Super. A.D. 1992)(a plaintiff may prove a defect either

by circumstantial evidence which would permit an inference that a dangerous and defective condition existed prior to sale, or ***by negating other causes*** in order to make it reasonable to infer that a dangerous condition existed while defendant had control of the product)(emphasis added). *Accord*, RESTATEMENT (THIRD) TORTS: PRODUCTS LIABILITY, § 3.

The court of appeals opinion in this case incorrectly required that the OSI defect evidence meet a higher standard than the law requires of the Plaintiff – that is, to show a specific defect. This standard is contrary to Missouri law.

Once the defect witnesses negate other causes of the sudden acceleration (pedal error or mechanical malfunction) the only cause left is the cruise control. The trial court carefully considered the evidence and determined that these incidents were similar in all of the relevant considerations.

The defect witnesses eliminated pedal error and mechanical cause. This placed this accident on all fours with the defect OSI's the trial court allowed. GM's argument that some of these OSI's are not similar because some of the witnesses testified that they pressed the brake pedal without deactivating the cruise control – and Mrs. Peters did not press the brake pedal – misunderstands the similarity requirement. This is because each case involved a person who drove a W car with a cruise control ("*like character*"). Each started the car and experienced a sudden acceleration condition ("*occurred under substantially the same circumstances*"). Each testified that no pedal error caused the

sudden acceleration ("*resulted from the same cause*"). That the cruise control failed to disengage when the brake was applied does not change the fact that the sudden acceleration resulted from the same cause – the defective cruise control.

Seven witnesses who had experienced sudden acceleration incidents in "W" cars that were not the result of pedal misapplication testified at trial.

1. Shirley Kelly.

Shirley Kelly drove a 1990 Pontiac Grand Prix equipped with cruise control. (T648-49). She described two sudden acceleration incidents.

During the first incident, she testified that she started her vehicle, put it into reverse, and the vehicle surged backwards at a rapid rate of speed, crashing into another vehicle before she was able to put her vehicle back into park. (T649-50). She rested her foot lightly on the brake before shifting into reverse; when she lifted her foot from the brake her vehicle shot backwards. (T650-51). She was absolutely certain that she did not press the accelerator. (T651). GM inspected her vehicle and found nothing wrong with it. (T652-53).

Several months later, she experienced a second sudden acceleration incident in her vehicle. (T654). She started her vehicle, put it into reverse, and the vehicle shot backwards out of her garage. (T654-55). After the vehicle surged backward Mrs. Kelly depressed the brake, but she could not stop the vehicle with the brake; she put the vehicle into park to stop it. (T655). Mrs. Kelly was absolutely certain that she did not depress the accelerator during this second incident. T656).

2. Dan Kelly.

Dan Kelly was Shirley Kelly's husband. (T676). Mr. Kelly was a professional bus driver for nearly 30 years. (T679). He experienced a sudden acceleration incident in the same vehicle. (T676). He put the vehicle into reverse, let his foot off the brake so he could idle backwards out of a parking spot, and the vehicle shot backwards about 6 feet before he could stop it by putting it into park. (T677-78). This incident occurred after his wife had experienced her sudden acceleration incidents in the vehicle. (T679). Mr. Kelly was absolutely certain that his foot was not on the accelerator when the vehicle surged backwards. (T680).

3. Delores Major.

Delores Major experienced a sudden acceleration incident in a 1992 Chevy Lumina equipped with cruise control. (PEX 557, 6-8, 42 [Major]). She started the vehicle in her driveway; it took off when she put it into reverse, (Id.11), accelerated across the street and struck a tree. (Id.12). She was positive that she had her foot on the brake, not the accelerator, when she put the vehicle into reverse. (Id.11,16). She experienced sudden acceleration incidents in this vehicle on several occasions. (Id.20). Her husband also experienced sudden accelerations incidents in this vehicle. (Id.20-21). She had never experienced similar incidents in any other vehicle she had driven. (Id.21).

GM investigated the incident (Id.17-18) and told Mrs. Major that the incident was the result of driver error. (Id.19).

4. Clifton Blackwood.

Clifton Blackwood experienced a sudden acceleration incident in a 1992 or 1993 Chevy Lumina equipped with cruise control. (PEX 563, 5, 8 [Blackwood]). He put the vehicle into reverse while he had his foot on the brake and when he took his foot off the brake, the vehicle shot backwards and struck a vehicle behind it. (Id.11-13).

He was "certain" that he was not touching the accelerator when the vehicle shot backwards. (Id.36). He didn't have time to get his foot back to the brake until after his vehicle had struck the vehicle behind it. (Id.12, 37). He took his vehicle to a mechanic several days later to have it repaired; the mechanic put the vehicle into reverse and it suddenly accelerated backwards again. (Id.17-18). He had never experienced a similar incident in any other vehicle. (Id.14).

5. Mary Cutwright.

Mary Cutwright experienced a sudden acceleration incident in a 1991 Chevy Lumina equipped with cruise control. (PEX568, 6-7, 40-41[Cutwright]). She turned the vehicle on with her foot on the brake; when she shifted into reverse, it took off backwards, crossed the street, and struck a house. (Id.8,12-13). She was "positive" she was pressing the brake and not the accelerator. (Id.17). GM told her there was nothing wrong with her vehicle. (Id.22-23).

6. Dorothy Foy.

Dorothy Foy experienced two separate sudden acceleration incidents in a 1992 Chevy Lumina equipped with cruise control. (PEX583, 4, 14, 26-27 [Foy]).

In the first incident, the vehicle was parked in a parking lot and "the moment [she] put it out of park into reverse [she] was shot like a rocket down the parking lot." (Id.7-8). Her foot was on the brake pedal when she shifted into reverse. (Id.9). Her foot was never on the accelerator during this incident. (Id.)

She experienced a second sudden acceleration incident when the vehicle was in her garage. (Id.14-15). She placed the vehicle into reverse with her foot on the brake and the vehicle accelerated backwards out of her garage. (Id.16). She was sure she had her foot on the brake and not on the accelerator. (Id.19-20).

7. Julie Benjamin.

Julie Benjamin experienced a sudden acceleration incident in a 1993 Chevy Lumina equipped with cruise control. (PEX773, 4-5, 16, 22 [Benjamin]). She put the vehicle into reverse with her foot on the brake and then started to back up. (Id.6). She had backed up one or two feet when the engine suddenly revved up. (Id.7) She put her foot back on the brake but she couldn't stop the vehicle; it accelerated backwards into a truck. (Id.8). She never put her foot on the accelerator during this incident. (Id.38-39, 43). GM informed her there was nothing wrong with her vehicle. (Id. 13-15).

Each of these OSI's meets the standard for admission of defect OSI's under Missouri law. They were of A(1) [were] of like character, (2) occur[ed] under substantially the same circumstances, and (3) result[ed] from the same cause. The two occurrences do not need to be completely symmetrical.≅ Thornton, 62 S.W.3d at 583. The trial court did not abuse its discretion in admitting these OSI's to show defect.

Point III should be denied.

IV. GM EXPERT'S CHANGE OF OPINION AT TRIAL

"He never did this before, Your Honor. This is brand new."

GM's counsel to trial court considering objection to Moffatt changing his opinion. (T1280).

Review of a trial court's decision to exclude previously undisclosed opinions of an expert offered for the first time at trial is for abuse of discretion. Pasalich v. Swanson, 89 S.W.3d 555, 561 (Mo. App. 2002). "The trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the trial court and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration." Sheehan v. Northwestern Mut. Ins. , 103 S.W.3d 121, 125 (Mo. App. E.D. 2002).

A. Moffatt Attempted to Offer a New Opinion at Trial.

Plaintiffs' expert testified that acceleration from the tree occurred because two tires climbed over the planter; prior to trial GM's Moffatt opined that only one tire climbed the planter, negating Plaintiffs' experts showing of acceleration from the tree. In opening statement, Plaintiffs commented on Moffatt's opinion and showed mulch in the tire that Moffatt said had not entered the planter.

At trial Moffatt attempted to offer a new opinion at trial: that the Cutlass traveled 95 feet, across the street, over curbs on either side of the street, uphill, climbing a planter that was approximately one foot off of the ground, all with no acceleration. (T405, 409,

420-21, 423, 455, 458, 1253-54).even if two tires went over the planter. When Plaintiffs objected, GM's counsel acknowledged that Moffatt's two-tire opinion was new, stating: "He never did this before, Your Honor. This is brand new." (T1280).

Moffatt's two-tire opinion came as a surprise to Plaintiffs; it was contrary to Moffatt's deposition testimony in which Moffatt's opinion assumed that only one tire of the Cutlass had climbed over the planter, requiring no acceleration. (T1242, 1276).

In opening statement, Plaintiffs' counsel, relying upon Moffatt's prior deposition testimony, told the jury that Moffatt's reconstruction of the accident was based upon his conclusion that only one tire of the Cutlass climbed the planter in the Peters' yard. (T240-41). At trial, most of Moffatt's testimony was consistent with his deposition testimony in that Moffatt testified that his analysis of the accident and his opinions were based upon the conclusion that only one tire climbed the planter. (T1276). However, Moffatt then attempted to state a new opinion based upon the assumption that two tires climbed the planter. (T1280). Moffatt indicated that he arrived at this new opinion by going through his analysis again, starting from the assumption that two tires climbed the planter. (T1280).

Plaintiffs' counsel objected to Moffatt offering his new opinion for the first time from the stand. (T1280). At a bench conference, when asked if Moffatt's new opinion had ever been disclosed to Plaintiffs, defense counsel replied **"No. He never did this before, Your Honor. This is brand new."** (T1280). In support of his objection, Plaintiffs' counsel explained that the opinions Moffatt stated in his deposition were all

based upon Moffatt's conclusion that one tire had climbed the planter, while the new opinion contained analysis that Moffatt had never disclosed to Plaintiffs. (T1281-82). The court sustained the objection, ruling that Moffatt could not offer the new opinion. (T1282-83). When defense counsel made his offer of proof on this issue, Moffatt indicated that his new opinion required him to perform new calculations, tracing his analysis all the way back to the time that the Cutlass left the tree in the neighbor's yard. (T1326-27).

GM did not include a copy of Moffatt's deposition in the record on appeal. Therefore, this Court is denied the opportunity to review the discrepancy between Moffatt's trial testimony and Moffatt's deposition testimony which served as the basis for the trial court's exclusion of Moffatt's testimony.

B. GM Has Waived Its Argument Regarding The Exclusion Of Moffatt's Testimony Because GM Failed To Provide The Record Necessary To Consider This Issue On Appeal.

Obviously, in order for this Court to adequately consider a discrepancy between the opinion that Moffatt offered in his deposition and the opinion that Moffatt attempted to offer at trial, this Court would need to review Moffatt's deposition testimony. However, GM has failed to include Moffatt's deposition testimony in the record on appeal. Consistent with its pattern, GM attempts to avoid this difficult fact by relegating it to a footnote. (App.Br.88, fn 23). By this subterfuge, GM tries to convey the

impression that its failure to provide an adequate record on appeal is no big deal. Missouri courts have consistently ruled to the contrary.

"The record on appeal shall contain all of the record, proceedings and evidence necessary to the determination of all questions to be presented." RULE 81.12(a). The appellant bears the burden of including all material in the record that is necessary to address the issues that the appellant raises on appeal. State v. In the Interest of S.A.N., 158 S.W.3d 863, 866 (Mo. App. 2005); Beckmann v. Miceli Homes, Inc., 45 S.W.3d 533, 542-43 (Mo. App. 2001). When the appellant fails to include material in the record that bears upon an issue that appellant raises on appeal, it is presumed that the omitted material would have been unfavorable to appellant. Beckmann, 45 S.W.3d at 543; In re Estate of Abbott v. Abbott, 944 S.W.2d 279, 284 (Mo. App. 1997).

By failing to include Moffatt's deposition testimony in the record on appeal, GM has failed to provide this Court with material that bears upon the propriety of the trial court's ruling to exclude Moffatt's testimony. This Court must presume that the omitted material would be unfavorable to GM's argument that the trial court improperly excluded Moffatt's new opinion at trial. Moreover, this Court cannot properly consider the trial court's ruling regarding the exclusion of Moffatt's new opinion due to the incomplete record that has been provided by GM. Therefore, GM has waived its argument regarding the exclusion of Moffatt's new opinion.

C. The Trial Court Properly Excluded The New Expert Opinion That Moffatt Attempted To Offer For The First Time At Trial.

GM argues that it should have been allowed to elicit a new opinion from Moffatt during trial because it was surprised by the fact that Plaintiffs' counsel emphasized the differences between the testimony of Wallingford and Moffatt regarding how many tires climbed the planter. It is difficult to understand how GM could have been surprised by this line of argument.

Wallingford testified in his deposition that two tires of the Cutlass climbed the planter. Moffatt's deposition opinion relied on his view that only one tire rode over the planter. It should not come as a shock to GM that Plaintiffs' counsel chose to emphasize the fundamental differences in the testimony of the parties' opposing experts at trial. In reality, GM attempted to surprise Plaintiffs at trial by having Moffatt offer a new opinion that he had never disclosed in discovery.

"When an expert who has been deposed later changes his or her opinion before trial or bases it on new or different facts from those revealed at the deposition, the party intending to use the expert's testimony has the duty to disclose the new information to the opposing party, effectively updating the responses made during the deposition." Whitted v. Healthline Management, Inc., 90 S.W.3d 470, 475 (Mo. App. 2002); *accord*, Green v. Fleishman, 882 S.W.2d 219, 221 (Mo. App. 1994). When a change in the expert's opinion is not properly disclosed, "a trial court is vested with broad discretion as to its choice of a course of action and may, in the sound exercise of its discretion, reject such

evidence or impose other appropriate sanctions." Pasalich, 89 S.W.3d at 561 (Mo. App. 2002). The decision to reject new or changed opinion testimony "[is] not a question of law, but rather a matter within the sound discretion of the trial court." Cooper v. Ketcherside, 907 S.W.2d 259, 261 (Mo. App. 1995).

GM's attempt to surprise Plaintiffs at trial with Moffatt's new opinion violates the well-accepted rule requiring disclosure of new opinions. GM's decision to hide Moffatt's new opinion until his trial testimony had both the purpose and the effect of preventing Plaintiffs' accident reconstruction expert, Wallingford, from analyzing Moffatt's new opinion and assisting Plaintiffs' counsel in preparing for cross-examination. GM's decision to hide Moffatt's opinion until the last second also prevented Wallingford from addressing Moffatt's new opinion in his testimony at trial. And as the record reveals, GM's sanctioned-by-the-trial-court pattern of abuse of discovery rules in this case was consistent with its decision to hide Moffatt's changed opinion until trial.

GM attempts to justify the change in Moffatt's opinion by arguing that Plaintiffs raised the one tire/two tire distinction in their opening statement. However, the significance of this distinction was revealed in Wallingford's and Moffatt's depositions well before trial. Plaintiffs simply highlighted the differences between Wallingford's opinion and Moffatt's opinion in opening statement.

The fact that Plaintiffs relied upon the obvious distinction between Wallingford's opinion and Moffatt's opinion in their opening statement lends further support to the trial court's decision to deny Moffatt the opportunity to offer his new, made-to-surprise

opinion at trial. Vititoe v. Lester E. Cox Medical Centers, 27 S.W.3d 812, 818 (Mo. App. 2000), recognized that "[a]llowing such changes in opinion after an opening statement relying upon the deposition opinion, without sanction, would prevent a party from discovering by deposition the actual facts and opinions to which the expert is expected to testify." Id. In other words, when a plaintiff, in making an opening statement, has relied upon the previously stated opinions of the defendant's expert, the defendant's expert should not be allowed to change his opinions during the course of the trial if the plaintiff was not notified of such changes prior to trial. "Allowing experts to change their opinions after deposition and before trial without notice to their adversaries would frustrate the purpose of our discovery rules because it would prevent them from eliminating, as far as possible, concealment and surprise in litigation." Whitted, 90 S.W.3d at 475.

Plaintiffs prepared for trial based upon the opinion testimony that Moffatt expressed in his deposition. The trial court did not abuse its discretion when it precluded Moffatt from changing his opinions or expressing a new opinion in his testimony at trial.

D. GM's Arguments Regarding The Admission Of Moffatt's New Opinion At Trial Are Not Well Supported.

GM cites a series of cases in its brief for the proposition that an expert may provide testimony that only interprets and supports opinions that were previously stated in the expert's deposition. Regardless of whether this proposition is true, it is inapposite

because Moffatt did not merely offer testimony that interpreted and supported his previously stated opinions: Moffat stated **brand new** opinions.

Ironically, each of the cases that GM cites makes the precise point that Plaintiffs made in the preceding section:

> [W]hen an expert witness has been deposed and he later changes his opinion before trial or bases that opinion on new or different facts from those disclosed in the deposition, it is the duty of the party intending to use the expert witness to disclose that new information to his adversary, thereby updating the responses made in the deposition.

Darnaby v. Sundstrom, 875 S.W.2d 195 (Mo. App. 1994)(internal quotation omitted); see also Tax Increment Financing Com'n of Kansas City v. Romine, 987 S.W.2d 484, 487 (Mo. App. 1999); Blake v. Irwin, 913 S.W.2d 923, 931 (Mo. App. 1996).

The cases cited by GM agree that it is inappropriate for an expert to attempt to base his opinion upon "new or different facts from those disclosed in the deposition." That is precisely what Moffatt attempted to do in this case. Moffatt changed the underlying factual basis for his new opinion by performing new calculations based upon the assumption that two tires traveled over the planter. This new opinion, based upon different underlying facts, is prohibited by GM's own cases.

GM also cites two cases–Cooper, 907 S.W.2d 259 (Mo. App. 1995) and Waters v. Barbe, 812 S.W.2d 753 (Mo. App. 1991)–for the proposition that an expert may be allowed to offer a new opinion at trial when that opinion is necessary to rebut a new issue

that was injected into the case by the opposing party. Neither of those cases supports GM because Plaintiffs did not inject any new issue into the case.

Plaintiffs' expert never changed his opinion that two tires went over the planter. Plaintiffs merely commented upon, and contradicted, Moffatt's theory. Mere comment and contradiction of an expert's opinion does not provide a predicate for that expert to offer an entirely new theory at trial.

Finally, GM cites Mische v. Burns, 821 S.W.2d 117 (Mo. App. 1991) for the proposition that "when a subject 'has been voluntarily broached by one party, and such of its contents drawn off as serve to discredit the other or disparage his case, the relevant remainder may be examined, to the end that the sample produced may be more dependably analyzed in the light of the whole truth.'" (App.Br.88). GM understandably leaves off the first portion of the quoted passage. The full quote from Mische is as follows:

> [W]henever **an improper subject of inquiry** has voluntarily been broached by one party, and such of its contents drawn off as serve to discredit the other or disparage his case, the relevant remainder may be examined, to the end that the sample produced may be more dependably analyzed in the light of the whole truth.

Mische, 821 S.W.2d at 119 (emphasis added). The passage that GM omits is crucial to the analysis.

Here, there was nothing improper about Plaintiffs commenting upon Moffatt's theory and pointing out that the evidence contradicted Moffatt's theory. Thus, there was no improper line of inquiry that was opened by Plaintiffs. Once again, the mere fact that Plaintiffs point out that the evidence contradicts Moffatt's theory does not entitle Moffatt to offer an entirely new theory for the first time from the witness stand during trial.

Point IV should be denied.

VI. REMITTITUR

Standard of Review

Section 537.068, RSMo provides:

> A court may enter a remittitur order if, **after reviewing the evidence in support of the jury's verdict**, the court finds that the jury's verdict is excessive because the amount of the **verdict exceeds fair and reasonable compensation for plaintiffs injuries and damages**.

(Emphasis added).

An order of remittitur constitutes a departure from the general rule that "[t]he assessment of damages is primarily the function of the jury." Henderson v. Fields, 68 S.W.3d 455, 485 (Mo. App. 2002); Foster v. Catalina Industries, Inc., 55 S.W.3d 385, 392 (Mo. App. 2001). The jury "is in the best position" to determine damages. Callahan v. Cardinal Glennon Hosp., 863 S.W.2d 852, 871 (Mo. Banc 1993). Accordingly, the jury is granted "virtually unfettered discretion to provide awards over a large range." Id. at 871.

Review of a decision to deny remittitur is for abuse of discretion. Foster, 55 S.W.3d at 392**.** Remittitur by this Court now would be improper unless no reasonable person could conclude that the amount of non-economic damages in this case is appropriate and no reasonable person could conclude that $11,639,681 (the value of the non-economic damages) properly values Connie Peters'

- loss of cognitive function,

- life in a persistent vegetative state,
- loss of an arm,
- need to depend totally on others for every bodily need and function, and
- inability to carry on a conversation with any other person on any subject for the remainder of her life.

Remittitur is improper unless no reasonable person could conclude that Randy Peters' daily vigil at Connie's bedside, devoid of hope for recovery and certain of the enduring and permanent loss of any meaningful emotional, spiritual, physical or even conversational relationship with his partner, best friend and lover is worth the jury's assessment of the value of that loss.

"Once [parties] place their fate in the hands of a jury, then they should be prepared for the result.... They cannot expect the [c]ourt to extricate them in all cases where the award is higher or lower than hoped for or anticipated." Barnett v. La Societe Anonyme Turbomeca France, 963 S.W.2d 639, 658 (Mo. App. 1998) (citing Vanskike v. Union Pacific Railroad Corp., 725 F.2d 1146, 1150 (8th Cir. 1983)).

A. Connie Peters' Injuries Are Severe And Support The Jury's Award And The Trial Court's Refusal To Grant Remittitur.

Connie Peters lost her left arm at mid-forearm in the accident caused by the Cutlass's sudden acceleration. When the paramedics arrived, her left arm was completely severed from her body. She had suffered significant blood loss.

She had a severe head injury as a result of several skull fractures and was unconscious. Her condition was ultimately described as a persistent vegetative state.

The jury heard:

- She could not communicate and has not since the accident.
- She cannot move herself.
- She is totally dependent on others for every need.
- She will not recover.
- Her attendants feed her through a surgically implanted tube.
- They clean her when her bowels move.
- She will face substantial medical issues with regard to her skin, her heart and her susceptibility to respiratory and other infections.

Dr. Terry Winkler testified that her life care plan ranged in cost from $4,016,980.91 (10 years) to $6,014,961.59 (15 years). (T609). Dr. Bernard Pettingill testified that her total economic loss reduced to present value, including lost wages and benefits, ranged from $4,916,045 (10 years in a residential facility) to $8,360,319 (15 years in a home treatment setting). (T802).

GM urges this court to remit the compensatory damage award to an amount less than $20 million. In support of their request for remittitur GM claims that the award of compensatory damages is excessive because the non-economic portion of the award–

approximately $11.6 million–is disproportionately large, and therefore reflects an abuse of discretion.

The verdict reflects fair and reasonable compensation for the devastating injuries sustained by Mrs. Peters. The verdict values Connie Peters' losses at $735,000 for each of Connie Peters' remaining 15 years of expected life. This Court should not accept GM's invitation to substitute its judgment for that of the jury and trial court.

B. Comparable Ratios Of Economic To Non-Economic Injury Have Been Affirmed On Appeal.

The ratio of non-economic to economic damages in this case is approximately 1.4:1 ($11,639,681/$8,360,319). GM claims this shocks the conscience and indicates a lack of careful consideration, meriting remittitur. Other cases affirmed on appeal have involved much larger disparities between economic and non-economic injuries.

In Ellis v. Kerr-McGee Chemical, 1999 WL 969278 (Mo. App. 1999) the court affirmed a compensatory award 51 times greater than the medical bills for a fractured cervical vertebrae. In Larabee v. Washington, 793 S.W.2d 357 (Mo. App. 1990) the court affirmed non-economic damages twenty-five times greater than economic damages. Similarly, in King v. Unidynamics Corp., 943 S.W.2d 262 (Mo. App. 1997) the court affirmed a verdict of compensatory damages twenty-five times greater than the medical bills where the plaintiff slipped on a walkway and suffered shoulder injuries. And in Graham v. County Medical Equipment Co., Inc., 24 S.W.3d 145, 148 (Mo. App. 2000), the court approved a jury verdict of $500,000 based on medical specials of $1,500 – a multiplier of more than 333.

The Supreme Court has approved as reasonable a greater verdict with a substantially higher ratio of economic to non-economic damages than exists here. In Alcorn, the Supreme Court approved a $25,000,000 award that was 11.5 times the economic damages. Alcorn, 50 S.W.3d at 250 n. 4. By the Alcorn standard, this verdict is within the range of fair and reasonable.

GM asks the Court to consider cases it has selected as a point of comparison, without giving the Court an appropriate sampling. Furthermore, while GM points to historical verdicts taken only from appellate reporters in making their comparisons regarding the range of the verdict, GM omits a number of important cases whose approved verdicts, when adjusted for inflation, are similar to the jury's verdict for Mrs. Peters in this case.

Callahan approved a $16,000,000 verdict. The $16 million Callahan verdict is worth more than $20 million in 2003 dollars. Firestone v. Crown Center Redevelopment Corp.**,** 693 S.W.2d 99 (Mo. Banc 1985) approved a $15 million verdict in 1985 dollars. Adjusting for the consumer price index eighteen years later, that verdict would be more than $25 million in 2003 dollars.

The jury's award of $20 million reflects the jury's and the trial court's judgment of the proper compensation for the loss Mrs. Peters sustained as a result of GM's defective product. That amount is supported by the evidence and is within the range of fair and reasonable under Missouri precedent. Remittitur is not authorized under §537.068.

C. Randy Peters' Loss Of Consortium Claim Was Not Excessive.

The jury awarded Mr. Peters $10 million for his loss of consortium.

Mr. Peters was the first person to arrive at the accident. He saw his wife, who had celebrated a birthday the previous day, slumped over the console, unconscious and bleeding. He called 911. (T831). He returned to the car and held her head (T833), perhaps hoping his touch would somehow comfort the woman with whom he had spent 25 years, to whom he had said "I love you" only minutes before (T827), and with whom he will never have another conversation, share an intimate touch, whisper his hopes and dreams.

What has Mr. Peters lost? When asked what he missed most about Connie, he said, "I lost my partner, my lover, my companion, my best friend. That's about the best way I can say." (T842).

The jury learned that Randy Peters spent the night in the hospital numerous times during the three months Connie was there. (T814). When Connie had seizure spells, he spent nights in the hospital again, "celebrating" the New Year waiting for news that the seizures were under control. (T836). He has not hidden his loss and grief in denial. He visits Connie every day. He goes to see her after work–after he has done all of the chores that both she and he did at home–after all that he leaves his now empty home around 7:00 p.m. and spends the evening with his wife at the care facility. (T838).

Eric Peters testified that the accident was "devastating to our family. We're a small family...and mom was the glue that kept all of us together and it was just absolutely devastating...especially [for] my dad." (T816).

GM now says that it was an abuse of discretion for the trial court to deny its motion for remittitur. GM argues that no reasonable jury and no reasonable trial judge could conclude that Mr. Peters' nightly, hopeless vigil and the loss of his wife for the twenty years the life expectancy charts say she would have had but for this accident is not worth $500,000 each year. (T586).

Moreover, GM asks the Court to consider cases in which serious injuries were the basis of the consortium verdict, but not a wife lying in a persistent vegetative state – not a situation where physical life continues but higher mental states are totally absent. In the cases GM cites, paralysis and limited ability to communicate are terrible losses to be sure, but hardly as devastating as the loss Randy Peters faces each day as he makes his way to his hopeless evening vigil at Connie's bedside.

Because consortium damages are derivative of the primary-injured-party's damages, it is reasonable to consider the ratio between the two types of damages when determining whether a consortium award is excessive. Here the ratio is 2:1 – that is, Mrs. Peters' award is twice Mr. Peters' award.

Several Missouri cases have affirmed consortium awards in which the ratio between the consortium award and the amount of damages awarded to the primary-injured-party was less than the ratio in this case:

- Oliver v. Cameron Mutual Insurance Co., 866 S.W.2d 865 (Mo. App.1994) (court approved a 1:1 ratio)
- Patrick v. Alphin, 825 S.W.2d 11, 14 (Mo. App. 1992) (court approved a 1.875:1 ratio) ("The injury sustained by Patrick was catastrophic, both to himself and to his wife. His condition renders him unable to work or to participate in normal family and social activities. The condition requires considerable work and effort by family members to cope. We are unable to say that the award shocks the conscience").
- Hodges v. Oberdorfer Motors, Inc., 634 S.W.2d 205 (1982) (court approved a 1.43:1 ratio).

In each of these cases, the ratio between the consortium award and the amount of damages awarded to the primary-injured-party was less than the 2 to 1 ratio in the instant case. Thus, there is ample precedent for a consortium award that is half of the amount awarded to the primary-injured-party.

GM argues that the consortium award in Lohman v. Norfolk & Western Railway Co., 948 S.W.2d 659 (Mo. App. 1997), shows that the consortium award here is excessive. Lohman supports the consortium award in this case. The Lohman jury awarded $3.4 million in consortium damages before reduction for comparative fault. Id. at 663. The Lohman ratio was approximately 2.5 to 1, a ratio only slightly higher than the 2 to 1 ratio that was present in this case.

GM also discusses Newman as support for its argument that the consortium award here is excessive. In doing so, GM fails to note that the injuries suffered by the spouse in Newman are substantially different from the injuries suffered by Mr. Peters in the instant case. Paralysis, while horrible, is less horrible than persistent vegetative state.

The jury award to Mr. Peters in this case does not shock the conscience. It was supported by the evidence and is within the range of fair and reasonable according to Missouri precedent.

D. Appellants Failed To Meet Their Burden Of Showing An Abuse Of Discretion.

Barnett suggests factors that a court should consider in weighing a compensatory damage award. These factors include (1) loss of income, (2) medical expenses, (3) plaintiff's age, (4) the nature and extent of plaintiff's injuries, (5) economic factors, (6) awards given and approved in comparable cases, and (7) the superior opportunity for the jury and the trial court to appraise the plaintiff's injuries and other damages. Barnett, 963 S.W.2d at 657. Application of the Barnett factors supports this jury's award.

The economic factors–(1) loss of income, (2) medical expenses, and (5) general economic factors–are not in dispute. They support the economic damages award in this case.

Given the magnitude of the injuries (the fourth Barnett factor), the length of time Connie was expected to endure her near persistent vegetative state and the length of time Randy will experience the compounding loss of his wife and her hopeless situation (the third Barnett factor) and the unique position of the jury and trial judge to evaluate the plaintiff and her injuries (the seventh Barnett factor), the $11.6 million non-economic portion of the damages award cannot be said to be "an abuse of discretion so grossly excessive that it shocks the conscience." King, 943 S.W.2d at 268. Neither the trial judge nor the jury abused their discretion. Id. The award of compensatory damages and loss of consortium damages should properly be affirmed on appeal.

VII. SUBMISSIBILITY OF PUNITIVE DAMAGES

"[W]e made sure that everybody that was in the release group engineering activity that had anything to do with cruise experienced what it would be like[] to be sitting in a parking lot and drop this thing into gear and just have the cruise take off on you…. [I]t was an experience that this is something that we didn't want to happen to us. We sure didn't want it to happen to our young teenage drivers and it's absolutely unacceptable to have my 60, 70-year-old father experience this thing or an older person and it was just unacceptable behavior for any of us that had children or anything like that to live with. We just weren't going to tolerate it."

GM Engineer Marshall Meads testifying on problems with the Three Mode Cruise Control. PEX 572, 16

Standard of Review

The test for determining whether the trial court abused its discretion in failing to sustain a motion for judgment notwithstanding the verdict is whether the plaintiff made a submissible case. Brown v. Hamilton Ins. Co., 956 S.W.2d 417, 419 (Mo. App. 1997). Appellate courts consider the evidence and the inferences drawn from that evidence in the light most favorable to the plaintiff. Seitz v. Lemay Bank & Trust Co., 959 S.W.2d 458, 461 (Mo. Banc 1998). Evidence contrary to the verdict is not considered. Id. "[J]ury verdicts will not be overturned unless there is a complete absence of probative facts to support the verdict." King, 943 S.W.2d at 264 (emphasis added); accord Kimbrough v. J.R.J. Real Estate Investments, Inc., 932 S.W.2d 888, 889 (Mo.App. 1996). There is no requirement that evidence be conclusive. Bhagvandoss v.Beiersdorf, Inc., 723 S.W.2d 392, 396 (Mo. Banc 1987). When considering

the trial court's decision to overrule a motion for judgment notwithstanding the verdict, "an appellate court will not reverse the trial court's decision unless that decision is clearly against the logic of the circumstances and unless reasonable persons cannot differ about the propriety of the trial court's decision and reasonable persons would conclude that the trial court erred." Blake v. Irwin, 913 S.W.2d 923, 931 (Mo. App. 1996). "Generally, the decision to award punitive damages is peculiarly committed to the jury and trial court's discretion, and the appellate court will only interfere in extreme cases." Barnett, 963 S.W.2d at 661.

Punitive damages require clear and convincing evidence. Rodriguez v. Suzuki Motor Corp., 936 S.W.2d 104, 110 (Mo. Banc 1996). By its plain language, a clear and convincing standard does not require doubt-free assurance, only evidence that is clear and readily convinces the trier of fact. "As we now construe the phrase, it really means that the court should be clearly convinced of the affirmative of the proposition to be proved. This does not mean that there may not be contrary evidence." Grissum v. Reesman**,** 505 S.W.2d 81, 85-86 (Mo. 1974).

Argument

GM's Point VII claims that punitive damages are available only where the evidence shows that GM had an "evil motive" for its actions. (App. Br. at 82, 87). This is not an intentional tort case. See, MAI 10.01 (requiring finding of evil motive or reckless indifference). GM's argument that an evil motive was required as a predicate for punitive damages simply misstates the law.

In addition to this incorrect legal argument, GM's Brief makes factual errors. It ignores evidence supporting the punitive damage verdict, instead reciting evidence that

the jury rejected. Specifically, GM contends that it cannot be liable for punitive damages because it conducted extensive engineering testing on the three-mode cruise control. (App. Br. At 84). It offers no explanation for what GM failed to do – heed the warnings of its then-engineering employees about the susceptibility of the three-mode cruise control to cause sudden acceleration because of its design. GM also claims that it had regulatory approval of its three-mode cruise control system and that this makes punitive damages legally impermissible. This argument misstates both the facts and the timing of the NHTSA review.

A. Evidence Supporting Punitive Damages.

GM's internal documents and the testimony of engineers Marshall Meads and Chester Rozanski proved by clear and convincing evidence that GM knew of the hazard of sudden acceleration from an electrical fault in the three-mode cruise control system years before the manufacture of the Peters' vehicle. Internal documents, authenticated by Meads and Rozanski, established that a policy that would have prohibited manufacture of the three-mode cruise control, because of its susceptibility to electrical faults, was first drafted in 1989.

Mr. Meads testified that when this policy was proposed the reviewing committees did a "hatchet job" on the proposal. Meads proposed this new policy after he was able to actuate the throttle through the cruise control with a single electrical fault in a test conducted at the GM facility. Meads testified:

> [W]e could hot wire and duplicate some of these failures, that is being one of them, at very low speed that shift into gear and just actuate the cruise and we made sure that everybody that was in the release group engineering activity that had anything to do with cruise experienced what it would be like[] to be sitting in a parking lot and drop this thing into gear and just have the cruise take off on you.

(PEX 572, 16 [Meads]). As Meads said:

> [I]t was an experience that this is something that we didn't want to happen to us. We sure didn't want it to happen to our young teenage drivers and it's absolutely unacceptable to have my 60, 70-year-old father experience this thing or an older person and it was just unacceptable behavior for any of us that had children or anything like that to live with. We just weren't going to tolerate it.

(Id.16).

While Meads proposed a different standard to alleviate his fears about injury to children or parents, other GM engineers were recommending that the company eliminate the three-mode cruise control on all vehicles. Chester Rozanski gave a presentation at a meeting on December 20, 1990, in which he made specific proposals regarding cruise control systems. (PEX574, 5, 7-8 [Rozanski]). At that meeting, one of the security issues that he addressed was the potential for a single fault to actuate the throttle. (Id.12-13). Mr. Rozanski indicated that in the three-mode cruise control system, a single fault

could actuate the throttle. (Id.14). Mr. Rozanski recommended that GM switch to the stepper-motor system. (Id.16).

GM received at least two hundred customer complaints related solely to the issue of notice of the propensity of the "W" car to experience sudden acceleration incidents. All of these complaints were communicated to GM–and all were ignored.

GM knew from its own internal testing that an electrical spike to its three-mode cruise control could actuate the throttle and turn the automobile into a uncontrolled, lethal projectile. It also knew from consumer reports that sudden acceleration occurred in its "W" vehicles. The class of persons at risk clearly included those in the car in which the sudden acceleration occurred. Thus, GM placed an unreasonably dangerous product in commerce with actual knowledge of its defect and its potential to maim or kill members of the class of persons of which Mrs. Peters was a member.

GM kept the information to itself, telling neither its customers nor the National Highway Traffic Safety Administration (the very agency that GM relies upon to defend its actions). GM's failure to act on the warnings of its engineers and the complaints of its customers meets the clear and convincing standard required for the imposition of punitive damages.

B. The NHTSA Report Does Not Provide GM With Blanket Immunity From Punitive Damage Awards.

GM cites Alcorn, claiming it is inappropriate to award punitive damages when a defendant acts in reliance upon a regulatory determination. Even if this were an accurate description of the holding in Alcorn, it would still offer no relief to GM for two reasons. First, GM did not act in reliance upon a "regulatory determination." Second, GM failed to inform NHTSA of the internal studies it conducted that showed the possibility of sudden acceleration with the three-mode cruise control.

In 1999, well ***after*** Mrs. Peters' vehicle was built and well after Meads asked GM to abandon the three-mode cruise control system, NHTSA issued a report questioning the validity of Sero's theory regarding transient signals; NHTSA indicated that pedal misapplication was the most likely explanation of sudden acceleration incidents. However, NHTSA's report does not constitute a "regulatory determination" that the GM "W" car was safe or that the GM "W" car was free of defects. To the contrary, NHTSA has repeatedly stated that its investigative reports do not provide any basis for finding that a vehicle is defect free.

Plaintiffs' pre-trial Motion to Exclude 1999 National Highway Traffic Safety Administration Denial of Petition for Defect Investigation included two attached documents in which NHTSA specifically warned vehicle manufacturers that it was improper for them to use NHTSA reports as a basis for claiming that a particular vehicle is not subject to safety problems or is defect free. (LF3109, 3114-18). Thus, GM is

attempting to use the NHTSA report in exactly the manner that NHTSA has indicated its reports are not to be used.

Regardless of whether NHTSA's report would constitute a "regulatory determination," the NHTSA report does not fall within the scope of the principle stated in Alcorn. In Alcorn, an action was brought against a railroad for injuries that resulted due to the railroad's failure to make improvements to a crossing. Alcorn, 50 S.W.3d at 231-32. The Court noted that there was a regulatory scheme addressing upgrades to crossings. Id. at 235. The Court also noted that Union Pacific was in the process of upgrading the crossing pursuant to the regulatory scheme at the time of the Alcorn accident. Id. at 248. The Court concluded that Union Pacific's compliance with the crossing upgrade regulations absolved it from punitive liability.

> If there was no regulatory scheme, or if there was evidence that the railroad failed to cooperate or comply with the regulatory process, punitive damages might appropriately have been considered.
>
> * * *
>
> Where the railroad in fact cooperated with the regulatory process, reliance upon that process to do the crossing upgrade in due course does not relieve the railroad of liability in negligence. But conformity with the regulatory process does negate the conclusion that the railroad's conduct was tantamount to intentional wrongdoing.

Id. at 249.

Alcorn has no bearing upon the instant case. In this case, there is no regulatory scheme pertaining to the repair of defective conditions in GM's "W" cars. In fact, the NHTSA finding, relating to Mr. Sero, was not created until 1999, six years after the manufacture of the Peters' vehicle. That NHTSA report dealt with a Ford, not GM vehicle. Furthermore, there is no indication that GM was in the process of eliminating the defective condition of its "W" car at the time Mrs. Peters sustained her injuries. To the contrary, GM continues to deny that its "W" car was in a defective condition.

Finally, GM never told NHTSA that its own engineers had proposed a policy that would have eliminated the three-mode cruise control system to remove susceptibility to cruise control inadvertent throttle actuation; and GM never told NHTSA of its 200+ customer complaints of sudden acceleration in the "W" car. A fully informed NHTSA might have reached a different conclusion and may very well have viewed Mr. Sero's findings in a different light.

Reliance on an ill-informed, after-the-fact NHTSA report is inappropriate as a legal basis for avoiding punitive damages.

C. The Requirements For Punitive Damages.

The jury was instructed that to award punitive damages it must find that GM "knew of the defective condition and danger" and "thereby showed complete indifference to or conscious disregard for the safety of others...." (LF2667, 2668). The instructions were MAI instructions and properly set out the law.

This Court defines "conscious disregard or complete indifference" as:

> [A]n act or omission, though properly characterized as negligence, [that] manifest[s] such reckless indifference to the rights of others that the law will imply that an injury resulting from it was intentionally inflicted. Or there may be conscious negligence tantamount to intentional wrongdoing, as where the person doing the act or failing to act must be conscious … from his knowledge of surrounding circumstances and existing conditions, that his conduct will naturally or probably result in injury.

Hoover's Dairy, Inc. v. Mid-America Dairymen, Inc., 700 S.W.2d 426, 435 (Mo. banc 1985); accord Menaugh v. Resler Optometry, Inc., 799 S.W.2d 71, 74 (Mo. banc 1990) ("a claim for punitive damages is not inconsistent with a claim for negligence, so long as the evidence contains factual support for an award of punitive damages…."); Alack v. Vic Tanney International of Missouri, Inc., 923 S.W.2d 330, 339 (Mo. banc 1996); Lopez v. Three Rivers Elec. Coop. Inc., 26 S.W.3d 151, 160 (Mo. banc 2000); RESTATEMENT (SECOND) TORTS, § 500 cmt. f ("It is enough that [the defendant] realizes or, from facts which he knows, should realize that there is a strong probability that harm may result, even though he hopes or even expects that his conduct will prove harmless").

When a defendant ignores evidence that its product can cause serious injury or death, punitive damages are appropriate under Missouri law. Punitive damages are available:

> [W]hen there is evidence to show that a defendant had been put on notice of the fact that relevant information in regard to the dangerousness of the product was available to show that the product was actually known to constitute a health hazard to a given class of individuals and the defendant consciously chose to ignore the available information.

Hoskins v. Business Men's Assurance, 116 S.W.2d 557, 571 (Mo. App. 2003).

GM cites Kansas City v. Keene Corp., 855 S.W.2d 360, 374 (Mo. Banc 1993). Keene supports the punitive damages verdict in this case.

Keene was a products liability case. Kansas City sought actual damages and punitive damages because asbestos produced by Keene "was dangerous to persons other than unprotected workers" who frequented Kansas City's airport ("KCI"). Id. at 375 (emphasis added). The Supreme Court held that the defendant's actual knowledge of health danger to workers constantly exposed to asbestos was not equivalent to specific knowledge that flaking and crumbling asbestos could harm the general public who came to KCI to board airplanes. Id. This lack of specific knowledge concerning the danger facing persons who were in the non-worker class defeated the plaintiff's punitive damage claim. Here, Mrs. Peters is within the class of persons who faced injury because of the defect in the three-mode cruise control – a defect and danger of which GM had full awareness.

Alack extended Keene's analysis from a strict liability setting into a negligence setting.[3] Alack, a negligence case, said that "the evidence must show that, at the time of the act complained of, the defendant had knowledge of a high degree of probability of injury to a specific class of persons." Alack, 923 S.W.2d at 339 (citing Keene).

GM relies on three cases for authority that Plaintiffs failed to make a submissible case of punitive damages.

In Drabick v. Stanley-Bostitch, Inc., 997 F.2d 496 (8th Cir. 1993), the Eighth Circuit concluded that Stanley-Bostitch was not liable for punitive damages as a matter of law after its nail gun inadvertently fired when it touched the head of the plaintiff. That court denied punitive damages because of Stanley-Bostitch's prompt action to remedy the defect and warn users once it discovered the problem.

> [W]hen Bostitch became aware of the inadvertent discharge problem, it immediately took steps to make the product safer. These steps included altering the handle design to make it easier to carry without holding down the trigger, introducing the sequential trip actuation device (which consumers did not prefer, but which Bostitch continued to market), and including specific and explicit warnings in the operation manual and on the nailer itself.

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[3] Bhagvandoss states that "similar considerations apply" in a punitive damage analysis whether the cause of action is strict liability or negligence. Bhagvandoss, 723 S.W.2d at 397.

Id. at 510. Evidence of "prompt" action by GM to remedy the defect in its three-mode cruise control or warn consumers is wholly absent in this case. Drabick supports the Peters' punitive damages verdict.

Next, GM cites Ford v. GACS, Inc., 265 F.3d 670 (8th Cir. 2001). Ford involved auto transport tie downs that caused minor injury to transport drivers. The Eighth Circuit concluded that a punitive damage award under Missouri strict liability theory required a showing that "the defendant must be aware of unreasonable danger, not just any danger." Id. at 678 (quoting Drabick, 997 F.2d at 510). The Court properly presumed that where grave danger may occur, knowledge of that danger was a sufficient predicate for a punitive award. Thus, the absence of the threat of grave danger in Ford made punitive damages unavailable.

The danger presented by an out-of-control automobile weighing several thousand pounds is unreasonable danger because the stakes are so high, both to the driver and occupant of a vehicle and to other persons on the road. For this reason, Missouri has adopted the rule that where the risk of grave danger is high, the tortfeasor's duty increases and the availability of punitive damages also increases.

> The potential and seriousness of harm arising from a breach of duty is inevitably a part of the determination of whether conscious indifference to consequences has been established. The level of care required is directly proportional to the potential for harm from the breach [of the duty].

Blum v. Airport Terminal Services, Inc., 762 S.W.2d 67, 73 (Mo. App. 1988).

Under Ford, punitive damages are appropriate in this case. GM ignored the possibility of extremely serious injury. This is the conscious disregard for the safety of others that is the predicate to a punitive damages award.

GM's third case is Bhagvandoss, a products liability case in which the jury awarded punitive damages because of the defendant's inaction upon receipt of "initial" reports of fungal contamination of non-sterile compression bandages. Bhagvandoss, 723 S.W.2d at 398. The Supreme Court reversed the punitive damages award because the defendant "gave serious attention to the problem **and issued a warning**." Id. (emphasis added). The Court distinguished Rinker, a negligent failure to warn case in which punitive damages were upheld. In Rinker

> the evidence showed that the manufacturer had prior notice of 29 instances in which the fast idle cam of an automobile had broken, and that the manufacturer knew that a broken fast idle cam could cause the throttle to jam open. The court held that this knowledge, **and the manufacturer's total inaction following receiving knowledge, supported a finding of 'complete indifference to or conscious disregard to the safety of others.'**

Rinker 567 S.W.2d at 667-68 (emphasis added). On this evidence – evidence of less magnitude than is present in this case – the jury "could well conclude that Ford consciously or knowingly elected to disregard what it well knew to be a genuine potential for danger." Id. at 668. And the jury could conclude – as the jury concluded here – that GM's total inaction after receiving consumer reports and with full knowledge of its own

engineers' concerns supported a finding of complete indifference to or conscious disregard for the safety of others. See also Letz v. Turbomeca Engine Corp., 975 S.W.2d 155 (Mo. App. 1998) (upholding compensatory and punitive damages for failure to recall engines equipped with faulty nozzle guide vane); Barnett, 963 S.W.2d at 651 (defendant's own "internal reports," along with other evidence, established that the defendant had actual knowledge of the defect) (internal citations omitted).

VII. PUNITIVE DAMAGES REMITTITUR

Standard of Review

The jury found as matters of fact that GM "knew of the defective condition and danger" of the Cutlass at the time it sold the car to the Peters and that GM's conduct "showed complete indifference to or conscious disregard for the safety of others." This Court must accept these facts as true when conducting its constitutional analysis. Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 440 n.12 (2001) ("nothing in our decision today suggests that the Seventh Amendment would permit a court, in reviewing a punitive damages award, to disregard such jury findings"); BMW of North America, Inc. v. Gore, 517 U.S. 559, 585 (1996)(Supreme Court assumes jury's factual findings are true).

Review of constitutional issues surrounding punitive damages is de novo. State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003).

Argument

This is the nightmare case for GM because it reveals in stark detail the human destruction that can arise from its complete indifference or conscious disregard for the safety of others. This is also the case that most reveals the propriety of punishing GM and deterring GM and others from placing defective products on the market when it knows the products can kill and maim.

A. Remittitur Of The Punitive Damages Award Is Not Appropriate.

1. Comparison to other cases.

For its remittitur argument, GM asserts that the $50 million punitive damages award in this case is unprecedented. Its argument relies on a statistical comparison of the gross punitive damage awards approved in cases that have little or no factual similarity to the case sub judice.

GM cites no case in which the victim of its complete indifference or conscious disregard for the safety of others now lies in a persistent vegetative state, never to communicate again, totally dependent on others for every need and bodily function. For this reason, a comparison of the ratio of punitive damages to compensatory damages in other cases best measures the propriety of the punitive damages awarded in this case. See Letz, 975 S.W.2d at 179 ("[t]he ratio of punitive and actual damages is a commonly cited indicium of an unreasonable or excessive punitive damages award"); Henderson, 68 S.W.3d at 485 (where "ratio between compensatory and punitive damages is not notably high, or even significant" punitive damage award is not excessive). Further, the size of the verdict alone cannot establish jury bias, passion or prejudice. "The complaining party must show that the verdict, viewed in the light most favorable to the prevailing party, was glaringly unwarranted and that some trial error or misconduct of the prevailing party was responsible for prejudicing the jury.'" Willman v. Wall, 13 S.W.3d 694, 699 (Mo. App. 2000) (quoting Letz, 975 S.W.2d at 174).

Here, the ratio between punitive and compensatory damages was 1 to 1.66. Compare that low ratio to the following cases:

Case	Type of Case	Economic Damages	Compensatory Damages	Punitive Damages	Ratio
Letz	Wrongful Death	$798,643	$2,500,000	$26,500,000	10.6:1
Barnett	Wrongful Death	$649,080	$3,500,000	$26,500,000	7.57:1
Ellis v. Kerr-McGee Chemical, LLC, 1999 WL 969278 (Mo. App. 1999)	Spinal injury		$1,000,000	$4,000,000	4:1
Hoskins v. BMA, 116 S.W.3d 557 (Mo. App. 2003)	Asbestos/ Mesothelioma		$3,000,000	$7,000,000	2.33:1
Henderson	Wrongful Death		$3,300,000	$4,500,000	1.36:1

The punitive damages award in this case is appropriate when compared to other cases.

2. **The BMW and Letz factors support the punitive damages award.**

GM quotes BMW out of context. BMW actually says: "Only when an award can fairly be categorized as 'grossly excessive' in relation to the [State's legitimate interests in punishment and deterrence] does it enter the zone of arbitrariness that violates the Due

Process Clause of the Fourteenth Amendment." BMW, 517 U.S. at 568. As previously shown, the punitive damages award in this case is not excessive, much less grossly excessive.

In BMW, the Supreme Court held that a constitutional punitive damages award: (1) must relate to conduct occurring within the state; (2) a defendant must receive fair notice of the conduct that will subject him to punishment; and (3) a defendant must receive fair notice of the severity of the penalty that the state may impose. Id. at 574. Only the third BMW factor is at issue.[5]

Three "guideposts" inform the third element: (1) the degree of reprehensibility of the conduct; (2) the disparity between the harm or potential harm suffered by the plaintiff and its punitive damages award; and (3) the difference between this remedy and the civil penalties authorized or imposed in comparable cases. Id. at 574-75.

Reprehensibility

"Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." Id. at 575. The jury found by clear and convincing evidence that GM "knew of the defective condition and

[5] Letz addresses seven factors for assessing the propriety of a punitive damages award. GM addresses only those Letz factors that overlap the BMW factors. Plaintiffs will not address the Letz factors that GM does not address. The Letz factors support the punitive damage award here.

danger" of the Cutlass at the time it sold the car to the Peters and that GM's conduct "showed complete indifference to or conscious disregard for the safety of others." For purposes of the reprehensibility analysis, this is a factual finding that this Court must accept as true and is sufficient to show a high degree of reprehensibility.

Ratio to Actual Harm

The jury assessed Mrs. Peters' damages at $20 million and Mr. Peters' damages at $10 million. That is the measure of actual harm. As previously shown, a 1.66 to 1 ratio is reasonable. State Farm does not change that conclusion.

This case is a single digit multiplier case. State Farm suggests "single-digit multipliers are more likely to comport with due process" than double or triple digit awards. State Farm, 123 S.Ct. at 1524; see also McClain v. Metabolife International Co., 259 F.Supp. 1225, 1235 (N.D. Ala. 2003) (multiplier of less than 9:1 is presumptively constitutional); Zhang v. American Gem Seafoods, Inc., 339 F.3d 1020 (9th Cir. 2003) (approving 7:1 ratio based on $2.6 million punitive award); In re Exxon Valdez, 296 F.Supp.2d 1071 (D. Alaska 2004) (approving 9:1 ratio based on $4.5 **b**illion punitive damages award); Romo v. Ford Motor Co., 6 Cal. Rptr.3d 793, 812 (Cal. App. 5th Dist. 2003) ("we do not believe that the deathly harm component of the punitive award in the present case is strictly constrained by the single-digit multiplier set forth in State Farm," approving 5:1 ratio based on $23.7 million punitive award); Interclaim Holdings Ltd. v.

Ness, Motley, et al., 298 F.Supp.2d 746, 765 (N.D. Ill. 2004) (approving 3.4:1 ratio based on $27.7 million in punitive damages).

GM's claim that State Farm imposes a 1:1 "outermost limit" (App. Br. at 102) simply misstates the law.

Comparison to penalties imposed under state law

BMW notes that the concern addressed in this guidepost is notice to the defendant "of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." BMW, 517 U.S. at 574. Under BMW, the fact that a State may impose criminal penalties for similar conduct is worthy of consideration under the third guidepost. Id. at 575.

A person who recklessly causes serious physical injury to another person is guilty of assault, second degree, a class C felony. §565.060, RSMo. (2005) Contrary to GM's argument, the legislature has condemned the actions which the jury found that GM committed in this case. GM was on notice of the severity with which Missouri law addressed reckless conduct resulting in injury.

B. GM's Net Worth Is A Proper Consideration In Reviewing A Punitive Damages Award.

Letz lists among the factors for review of a punitive damages award "(3) the defendant's character, financial worth, and affluence" Id. at 178. GM misquotes Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) for a contrary view.

Haslip approves a multi-factor test (including "the 'financial position' of the defendant") to assure that "plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket." Id. at 22. Under Haslip, the wealth of GM is among the constitutionally valid considerations useful in determining the propriety of a punitive damages award. This conclusion makes common sense. An award that will punish GM must be sufficiently large that a company with assets exceeding $200 billion can feel it – else it is no punishment at all. Contrary to GM's argument, the constitution merely prohibits wealth as the sole justification for a punitive damage award. "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." BMW, 517 U.S. at 585.

Conclusion

The punitive damages award in this case is consistent with Missouri law and with the federal constitution. Point IX should be denied.

VIII. PREJUDGMENT INTEREST

Weremeyer v. K.C. Auto Salvage Co., 134 S.W.3d 633 (Mo. banc 2004) holds that prejudgment interest is due on awards of punitive damages.

GM asserts that Weremeyer does not apply retroactively because prejudgment interest is a procedural, not substantive provision of law. This argument is wrong. Section 408.040 requires the payment of money if procedural requirements are met. Plaintiffs met those procedural requirements, which Weremeyer did not change. The payment of money is a matter of substance, not procedure. Judicial interpretations of statutes apply retroactively absent unusual circumstances not present here. "Recognizing the existence of the general rule of retroactive effect of changes in the law wrought by its decisions, this Court has also recognized its authority to declare whether such decisions are retroactive or prospective "based on the merits of each individual case." Sumners v. Sumners, 701 S.W.2d 720, 723 (Mo. banc 1985)(citations omitted). Only where "the parties have relied on the state of the decisional law as it existed prior to the change, [will] courts … apply the law prospectively-only in order to avoid injustice and unfairness." Id.

GM claims that it relied on an interpretation of §408.040. RSMo. (2005) that did not permit prejudgment interest on punitive damages judgments. This is fascinating given GM's refusal to pay the compensatory demand made in this case. GM now seems to argue that it would have settled—or at least thought differently about settlement—had it known that it faced prejudgment interest on punitive damages. GM's argument is not credible.

Weremeyer must be applied retroactively.

CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's judgment entered in accordance with the jury's verdict.

Respectfully submitted,

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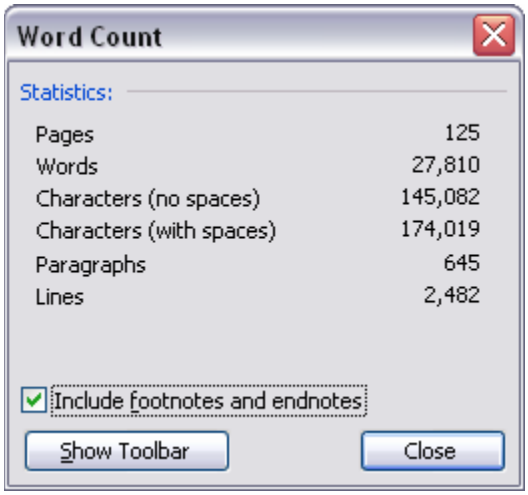
CERTIFICATE OF COMPLIANCE WITH RULE 84.06(b)

COMES NOW undersigned counsel and certifies that this brief complies with Rule 84.06(b) in that it contains 27810 words, is printed in 13 point type, and counsel has relied on the word processing program, Microsoft Word, to obtain the word count as shown below



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